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Supreme Court, U.S.
FILED

(1) 08-241 AUG 20 2008

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

GLENN S. COHEN,

Petitioner,

v.

BEACHSIDE TWO-I HOMEOWNERS' ASSOCIATION;
FREDRICK R. KRIETZMAN;
FELHABER, LARSON, FENLON & VOGT
A PROFESSIONAL ASSOCIATION;
U.S. BANCORP, D/B/A U.S. BANK HOME MORTGAGE,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

GLENN S. COHEN
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QUESTIONS PRESENTED

Does the Fair Debt Collection Practices Act ("FDCPA") apply to foreclosures of security interests against real property? The Eighth Circuit has created a circuit split by affirming the District Court's affirmation of a Magistrate Judge's ruling that the FDCPA does not apply to foreclosures. This places the Eighth Circuit in conflict with the authoritative decisions of five other United States Courts of Appeals – the Second, Third, Fourth, Fifth and Eleventh Circuits – which have held that foreclosures are subject to the FDCPA.

Is the collection of attorney's fees on foreclosure in excess of the amount permitted by state law a violation of the FDCPA, 15 U.S.C. § 1692f(1), if the underlying contract authorizes reasonable attorney's fees? In a novel interpretation of this section the District Court held, and the Eighth Circuit affirmed, that the collection of an amount prohibited by statute would not violate the FDCPA as long as the debtor had authorized the illegal amount in the underlying agreement creating the debt.

PARTIES TO THE PROCEEDING

The caption contains the names of all the parties to the proceeding in the court whose judgment is sought to be reviewed.

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OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals is unpublished but is electronically reported at 272 Fed. Appx. 534, and reprinted in the Appendix for Petitioner ("Pet. App.") at 1a-3a. The Eighth Circuit order denying Petitioner Glenn S. Cohen's ("Cohen's") petition for rehearing and petition for rehearing en banc is unreported. Pet. App. at 4a. The opinions of the United States District Court for the District of Minnesota are unpublished but are electronically reported at 2005 U.S. Dist. LEXIS 28536 and 2006 U.S. Dist. LEXIS 44978. Pet. App. at 5a-48a and 49a-95a. The opinion of the United States Magistrate Judge is unreported. Pet. App. at 96a-109a.

JURISDICTION

The District Court had jurisdiction over Cohen's federal claims pursuant to 15 U.S.C. § 1692k(d) and 28 U.S.C. § 1331; and supplemental jurisdiction over the related state law claims pursuant to 28 U.S.C. § 1367(a). The Eighth Circuit Court of Appeals had jurisdiction to review the District Court's final judgment pursuant to 28 U.S.C. § 1291. The Court of Appeals filed its opinion on April 9, 2008, and denied Cohen's timely petition for rehearing and petition for rehearing en banc on May 22, 2008. The statutory provision which confers on this Court jurisdiction to review the judgment of the Eighth Circuit Court of Appeals by Writ of Certiorari is 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Title 15 U.S.C. § 1692f provides, in relevant part:

§ 1692f. Unfair practices

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.

* * *

Title 15 U.S.C. § 1692a, the Fair Debt Collection Practices Act, "Definitions," is set forth verbatim at Pet. App. 110a-112a.

Minn. Stat. § 582.01, Attorney's Fees, is set forth verbatim at Pet. App. 113a-114a.

STATEMENT

The United States is experiencing mortgage foreclosures at an all-time high. The financial repercussions of the mortgage crisis dramatically affect the nation's economy and reverberate throughout society. *See* Merle, Renae and Tse, Tomoeh Murakami, "Mortgage Foreclosures Reach All-Time High," *The Washington Post*, March 7, 2008: page D01. *Available at* http://www.washingtonpost.com (accessed April 23, 2008). Pet. App. 115a-119a. Against the backdrop of the foreclosure crisis, a worrisome trend is appearing in district courts in several circuits in which the Fair Debt Collection Practices Act ("FDCPA") has been held to be inapplicable to foreclosures of security interests against real property. These decisions eviscerate the FDCPA and leave large and increasing numbers of debtors – a traditionally under-represented group – without federal statutory protection from abusive collection practices.

The Eighth Circuit has created a circuit split by affirming the Minnesota District Court's affirmation of a Magistrate Judge's ruling that the FDCPA does not apply to foreclosures of security interests against real property. This places the Eighth Circuit in conflict with the authoritative decisions of five other United States Courts of Appeals – the Second, Third, Fourth, Fifth and Eleventh Circuits – which have held that foreclosures are subject to the FDCPA. This case presents an excellent opportunity for this Court to restore the FDCPA's protections to mortgage foreclosure debtors by adopting, as a matter of law and public policy, the admonition of the Third Circuit, which stated, "if a collec-

tor were able to avoid liability under the FDCPA simply by choosing to proceed *in rem* rather than *in personam*, it would undermine the purpose of the FDCPA." *Piper v. Portnoff Law Assocs.*, 396 F.3d 227, 236 (3d Cir. 2005).

The Eighth Circuit additionally affirmed the District Court's ruling that collection of attorney's fees on foreclosure in excess of the amount permitted by state law is permissible, and not a violation of 15 U.S.C. § 1692f(1), as long as the underlying contract authorizes reasonable attorney's fees. This novel interpretation of this section is the first of its kind – defendants did not raise it, the District Court cited no authority for its decision and Petitioner is unable to find any. The District Court's interpretation of 15 U.S.C. § 1692f(1) leads to an absurd result, as the collection of an amount prohibited by statute would not violate the FDCPA as long as the debtor had authorized the illegal amount in the underlying agreement creating the debt. Thus, a creditor could circumvent the FDCPA by including a clause in a loan agreement – a contract of adhesion to start with – stating that the illegal amount was permitted.

This cannot stand for several reasons. First, it is axiomatic that a contract to undertake an illegal act is either void or unenforceable. *Sage v. Hampe*, 235 U.S. 99, 105, 35 S. Ct. 94, 95 (1914); Pye *v. Grunert*, 275 N.W. 615, 616; 201 Minn. 191, 193 (Minn. 1937). Second, a party may not waive a substantial protection of a statute "when it is inconsistent with the provision creating the right sought to be secured" and "a right conferred on a private party, but affecting the public interest, may not be

waived or released if such waiver or release contravenes the statutory policy." *New York v. Hill*, 528 U.S. 110, 116, 120 S. Ct. 659, 145 L. Ed. 2d 560 (2000). "[A] consumer's consent cannot waive protection from the practices the FDCPA seeks to eliminate, such as false, misleading, harassing or abusive communications. Permitting such a waiver would violate the public policy goals pursued by the FDCPA." *Clark v. Capital Credit & Collection Servs., Inc.*, 460 F.3d 1162, note 5 (9th Cir. 2006). Finally, a contract to pay attorney's fees in excess of an amount permitted by statute is a nullity in Minnesota. *Blair v. Coleraine*, 231 N.W. 193; 180 Minn. 388, 389 (Minn. 1930). Accordingly, this is a federal question of exceptional importance which has a profound effect upon, potentially, millions of consumer debtors, warranting the attention and guidance of this Court.

I. FACTUAL BACKGROUND

Cohen purchased a townhome in Minnetonka, Minnesota in 1997, thus becoming a member of the Beachside Two-I Homeowners' Association ("Beachside"). Cohen obtained a mortgage on the property from U.S. Bank. In 2003 Cohen fell behind in paying his monthly assessments to Beachside and various late fees and attorney's fees which were assessed against him. Beachside retained Krietzman, an attorney and employee of the Felhaber law firm, which regularly collects debts on behalf of its clients, to collect the $922.80 alleged to be due to Beachside as of September, 2003.

Subsequently, Krietzman sent Cohen a demand letter and commenced a statutory foreclosure by advertisement procedure to foreclose Beachside's

lien against Cohen's home. In May, 2004, Krietzman contacted U.S. Bank, informing them of the foreclosure sale. Shortly thereafter, and without Cohen's knowledge or permission, U.S. Bank paid $5,920.08 to Beachside to pay off the lien, including attorney's fees and late fees, and charged the disbursement to Cohen's real estate tax escrow account. Cohen subsequently sold his home in November, 2004.

II. PROCEEDINGS BELOW

Cohen filed an action in the District of Minnesota alleging violations of the FDCPA by Krietzman and Felhaber, including the collection of attorney's fees on foreclosure by advertisement in excess of that permitted by Minn. Stat. § 582.01 and improper late fees, in addition to other FDCPA violations. Cohen also alleged state law claims against Beachside and U.S. Bank.

Prior to the commencement of discovery, Cohen filed a motion for partial summary judgment. The District Court denied Cohen's motion in its entirety, but ruled for Cohen in *dicta* on the substance of several of his state law claims and one of the FDCPA claims. Cohen separately moved to amend his complaint to allege additional FDCPA violations, conversion and other state law claims. This motion was denied by a Magistrate Judge, who held that as a matter of law certain letters were sent in connection with lien enforcement rather than debt collection and therefore were outside the reach of the FDCPA, rendering the proposed amended complaint futile. The District Court ruled that the Magistrate Judge's decision was not clearly erroneous or contrary to law, and all but one

of Cohen's timely filed objections were overruled by the District Court.

Subsequently, the District Court granted defendants' motions for summary judgment, holding that even though the attorney's fees that were collected might have exceeded the amount permitted by state law, they were still "reasonable." Since the underlying contract allowed reasonable attorney's fees, the District Court reasoned that there was no FDCPA violation because the collection of the attorney's fees was permissible under the prong of 15 U.S.C. § 1692f(1) which permits collection of an amount expressly authorized by the agreement creating the debt. Cohen's appeal to the Eighth Circuit followed.

The Eighth Circuit affirmed in a brief per curiam decision, but modified the dismissal of Cohen's state law breach of contract claims against Beachside to be without prejudice. Cohen's subsequent petitions for rehearing and rehearing en banc were denied, and this Petition for Writ of Certiorari followed.

REASONS FOR GRANTING THE PETITION

The effect of the mortgage foreclosure crisis on the United States' housing market and the economy in general has been profound. With mortgage foreclosures at a record high, an unprecedented number of Americans are facing collection activity which can and does lead directly to the loss of their homes.

In such an environment, it is crucial that the statutory provisions of the FDCPA remain in place to provide financial breathing room and protection from the unfair collection practices of unscrupulous debt collectors for the millions of individuals affected by this crisis. Yet, there is an unsettling wave of district court cases, and now this Eighth Circuit case, which would eviscerate the FDCPA by holding that it is inapplicable to the foreclosure of a security interest in real property.

As a matter of law, and as a matter of public policy, this cannot stand. The intervention of this Court is urgently needed at this time of financial crisis.

I. FORECLOSURE IS A DEBT COLLECTION ACTIVITY AND SUBJECT TO THE FDCPA. THE EIGHTH CIRCUIT DECISION CREATES A CIRCUIT SPLIT ON THIS QUESTION OF EXCEPTIONAL NATIONAL IMPORTANCE

The District Court did not reach this question of law in its 6/29/2006 Order, though it did list the cases cited by both sides. Pet. App. 71a. However, in the 11/17/2005 Order (Pet. App. 39a-40a), over Plaintiff's objections [Docket No. 83] the District

Court ruled that the decision of the Magistrate Judge, holding that as a matter of law certain letters were sent in connection with lien enforcement rather than debt collection and therefore outside the reach of the FDCPA, was not clearly erroneous or contrary to law. By affirming this order, the Eighth Circuit has placed itself in conflict with the five other circuit courts that have ruled that enforcement of security interests is subject to the FDCPA. Respondents have cited only district court cases in support of their argument.

In April, 2006, the Fourth Circuit issued a decision in *Wilson v. Draper & Goldberg, P.L.L.C*, 443 F.3d 373 (4th Cir. 2006), which is precisely on point with this case. Citing the same rationale and cases that Petitioner set forth in his Objections to the Magistrate Judge's decision, the Fourth Circuit ruled that a mortgage could be "debt" under the FDCPA, and further, that parties undertaking a mortgage foreclosure could still be "debt collectors," as defined by the FDCPA. *Wilson* at 375-377.

In *Wilson*, the district court granted summary judgment in favor of the defendants, who claimed that they were not acting in connection with a "debt" and that they were not "debt collectors" as those terms are defined by the Act. The Court of Appeals reversed, concluding that the district court misinterpreted the scope of the Act, and holding that trustees, including attorneys, acting in connection with a foreclosure can be "debt collectors" under the FDCPA. *Wilson*, at 375-376.

> Defendants contend that foreclosure by a trustee under a deed of trust is not the enforcement of an obligation to pay money or a

"debt," but is a termination of the debtor's equity of redemption relating to the debtor's property. In essence, Defendants argue that Wilson's "debt" ceased to be a "debt" once foreclosure proceedings began...We disagree. Wilson's "debt" remained a "debt" even after foreclosure proceedings commenced. See *Piper v. Portnoff Law Assocs.*, 396 F.3d 227, 234 (3d Cir. 2005)...Furthermore, Defendants' actions surrounding the foreclosure proceeding were attempts to collect that debt. See *Romea v. Heiberger & Assocs.*, 163 F.3d 111, 116 (2d Cir. 1998) (concluding that an eviction notice required by statute could also be an attempt to collect a debt); *Shapiro & Meinhold v. Zartman*, 823 P.2d 120, 124 (Colo. 1992) ("[A] foreclosure is a method of collecting a debt by acquiring and selling secured property to satisfy a debt.").

Defendants' argument, if accepted, would create an enormous loophole in the Act immunizing any debt from coverage if that debt happened to be secured by a real property interest and foreclosure proceedings were used to collect the debt. We see no reason to make an exception to the Act when the debt collector uses foreclosure instead of other methods. See *Piper*, 396 F.3d at 236 ("We agree with the District Court that if a collector were able to avoid liability under the [Act] simply by choosing to proceed *in rem* rather than *in personam*, it would undermine the purpose of the [Act].")(internal quotation marks omitted).

Wilson v. Draper & Goldberg, P.L.L.C., 443 F.3d 373, 376 (4th Cir. 2006).

In the Eleventh Circuit case *In re Martinez*, 311 F.3d 1272 (11th Cir. 2002) (adopting District Court opinion reported at 271 B.R. 696 (S.D. Fla. 2001)), the FDCPA was found to be applicable to the service of a mortgage foreclosure packet including a summons, complaint, and related items called for by Florida mortgage foreclosure law.

Most recently, the Fifth Circuit has held that "a party who satisfies § 1692a(6)'s general definition of a "debt collector" is a debt collector for the purposes of the entire FDCPA even when enforcing security interests." *Kaltenbach v. Richards,* 464 F.3d 524, 529 (5th Cir. 2006). Relative to the Indiana District Court case *Rosado v. Taylor*, 324 F.Supp. 2d 917 (N.D. Ind. 2004) and similar cases, the Fifth Circuit declared, "the courts fail to recognize that the entire FDCPA can apply to a party whose principal business is enforcing security interests but who nevertheless fits § 1692a(6)'s general definition of a debt collector." *Kaltenbach v. Richards*, at 528. Along these same lines, the 2007 District of Minnesota case *Chomilo v. Shapiro, Nordmeyer & Zielke, LLP*, 2007 U.S. Dist. LEXIS 67826, is particularly troublesome because it held that a law firm executing a nonjudicial foreclosure proceeding "rather than collecting a debt" fell outside the ambit of the FDCPA, even though the law firm sent notices to the defendant stating that she owed $245,258.84 to the lender and that she "MUST" contact the law firm to obtain a payoff quote. *Chomilo*, at pp. 3, 18.

The assertion by Krietzman and Felhaber that the cases that Petitioner has cited in support of his

position on this issue of law contradict the Eighth Circuit's previous statement in *James v. Ford Motor Credit Co.*, 47 F.3d 961 (8th Cir. 1995) is misplaced. *James* merely stated that the FDCPA will apply to repossession companies acting to enforce others' security interests under certain circumstances. Nothing in *James* states that a debt collector that is otherwise subject to the FDCPA will no longer be subject to the FDCPA if they choose to enforce security interests. Krietzman and Felhaber's argument, as well as that of many of the district court decisions they cite, fails for this reason.

In short, the premise of a bifurcated definition of "debt collector," adopted in *Rosado v. Taylor*, wherein a party can be a "debt collector" for pre-foreclosure activities, yet cease to be a "debt collector" once foreclosure has begun, has been discredited. This proceeding, therefore, presents a question of exceptional national importance which warrants the attention and direction of this Court.

II. THE RULING THAT THE COLLECTION OF ATTORNEY'S FEES IN EXCESS OF THE AMOUNT PERMITTED BY STATE LAW IS NOT A VIOLATION OF THE FDCPA, IF THE UNDERLYING CONTRACT AUTHORIZES THE ILLEGAL AMOUNT, LEADS TO AN ABSURD RESULT

In its 6/29/2006 Memorandum Opinion and Order, the District Court stated that "the governing documents provide for the collection of "reasonable" attorney's fees, and there is no evidence that the

amount charged by Krietzman in this case is not reasonable." Pet. App. 77a-78a.

> Cohen argues that the amount collected exceeds the maximum permitted by Minn. Stat. § 582.01, and therefore is the collection of an amount not permitted by law. Assuming *arguendo* that Krietzman and Felhaber violated Minn. Stat. §582.01, they did not violate 15 U.S.C. § 1692f(1) because they satisfied the statute's alternative requirement, that the amount collected is expressly authorized by the agreement creating the debt.

6/29/2006 Opinion (Pet. App 78a), footnote 6.

The Court cited no authority for this novel interpretation of § 1692f(1). Krietzman and Felhaber collected $1,738.00 in attorney's fees relating to the lien foreclosure (8th Cir. App. p. 360). Minn. Stat. § 582.01 provides for a maximum of $500 and that "any provision for fees in excess thereof shall be void to the extent of the excess." Thus, Krietzman and Felhaber violated Minn. Stat. § 582.01. Because their legal fees exceeded the statutory maximum, the fees cannot be "reasonable" attorney's fees. Furthermore, the District Court's interpretation of § 1692f(1) leads to an absurd result, as the collection of an amount prohibited by statute that would otherwise violate the "permitted by law" prong of § 1692f(1), would not violate the FDCPA as long as the debtor had authorized the illegal amount in the underlying agreement creating the debt. Thus, a creditor could circumvent the FDCPA by including a clause in a loan agreement stating, for example, that in the case of foreclosure by advertisement, debtor will pay to creditor $10,000 in

attorney's fees. Although this would violate Minnesota law, the FDCPA would not be violated because the agreement stated that the $10,000 fees were permitted.

This cannot stand for several reasons. First, it is axiomatic that a contract to undertake an illegal act is either void or unenforceable. *Sage v. Hampe,* 235 U.S. 99, 105, 35 S. Ct. 94, 95 (1914); *Pye v. Grunert,* 275 N.W. 615, 616; 201 Minn. 191, 193 (Minn. 1937). Second, a party may not waive a substantial protection of a statute "when it is inconsistent with the provision creating the right sought to be secured" and "a right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy." *New York v. Hill,* 528 U.S. 110, 116, 120 S. Ct. 659, 145 L. Ed. 2d 560 (2000). "[A] consumer's consent cannot waive protection from the practices the FDCPA seeks to eliminate, such as false, misleading, harassing or abusive communications. Permitting such a waiver would violate the public policy goals pursued by the FDCPA." *Clark v. Capital Credit & Collection Servs., Inc.,* 460 F.3d 1162, note 5 (9th Cir. 2006). Finally, a contract to pay attorney's fees in excess of an amount permitted by statute is a nullity in Minnesota. *Blair v. Coleraine,* 231 N.W. 193; 180 Minn. 388, 389 (Minn. 1930).

Consequently, this novel interpretation of 15 U.S.C. § 1692f(1), which contravenes long-established cases holding that one may not contract to undertake an illegal act, creates a federal question of exceptional importance which warrants the attention and guidance of this Court.

CONCLUSION

The time is ripe for this Court's intervention to resolve the conflict among the Circuits regarding the applicability of the FDCPA to foreclosures of security interests in real property, and to clarify that 15 U.S.C. § 1692f(1) is violated when an amount is collected in excess of the amount permitted by state law, even if the text of the underlying document permits such a violation. Addressing these crucial issues will allow a wide spectrum of consumers to receive the protections intended by Congress, at this time of national crisis in the housing market.

For all of the foregoing reasons, Petitioner Glenn S. Cohen requests that this Honorable Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

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Dated: August 20, 2008

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

GLENN S. COHEN,

Petitioner,

v.

BEACHSIDE TWO-I HOMEOWNERS' ASSOCIATION;
FREDRICK R. KRIETZMAN;
FELHABER, LARSON, FENLON & VOGT
A PROFESSIONAL ASSOCIATION;
U.S. BANCORP, D/B/A U.S. BANK HOME MORTGAGE,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

APPENDIX FOR PETITIONER

GLENN S. COHEN
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OPINION OF EIGHTH CIRCUIT COURT OF APPEALS

Glenn S. Cohen, Appellant, v. Beachside Two-I Homeowners' Association; Fredrick R. Krietzman; Felhaber, Larson, Fenlon & Vogt, a Professional Association; U.S. Bancorp, doing business as U.S. Bank Home Mortgage, Appellees.

No. 06-2997

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

272 Fed. Appx. 534; 2008 U.S. App. LEXIS 7540

April 3, 2008, Submitted
April 9, 2008, Filed

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

PRIOR HISTORY: [**1]

Appeal from the United States District Court for the District of Minnesota.

Cohen v. Beachside Two-I Homeowners' Ass'n, 2006 U.S. Dist. LEXIS 44978 (D. Minn., June 29, 2006)

COUNSEL: Glenn S. Cohen, Plaintiff - Appellant, Pro se, Tennent, NJ.

For Beachside Two-I Homeowners' Association, Defendant - Appellee: Christopher Gerald Angell, MURNANE & BRANDT, St. Paul, MN; Thomas L. Garrity, STOCCO LAW OFFICES, Edina, MN; Thomas Arthur Gilligan, Jr., Acting Assistant Attorney General, MURNANE & BRANDT, St. Paul, MN; Sara Jeanne Lathrop, CITY ATTORNEY'S OFFICE, Minneapolis, MN; Nicholas J. O'Connell, MURNANE & BRANDT, St. Paul, MN.

For Fredrick R. Krietzman, Felhaber, Larson, Fenlon & Vogt, a Professional Association, Defendants - Appellees: William Lawrence Davidson, LIND & JENSEN, Minneapolis, MN; Kimberly Fleming, LIND & JENSEN, Minneapolis, MN; Sara Jeanne Lathrop, CITY ATTORNEY'S OFFICE, Minneapolis, MN; Paul C. Peterson, LIND & JENSEN, Minneapolis, MN.

For U.S. Bancorp, doing business as U.S. BANK HOME MORTGAGE, Defendant - Appellee: Sara Jeanne Lathrop, CITY ATTORNEY'S OFFICE, Minneapolis, MN; Charles Nathan Nauen, LOCKRIDGE & GRINDAL, Minneapolis, MN; Matthew R. Salzwedel, LOCKRIDGE & GRINDAL, Minneapolis, MN; David Joseph Zoll, LOCKRIDGE & GRINDAL, Minneapolis, MN.

JUDGES: Before MURPHY, COLLOTON, [**2] and SHEPHERD, Circuit Judges.

OPINION

[*534] PER CURIAM.

Glenn S. Cohen appeals the district court's [1] adverse grant of summary judgment in his lawsuit brought under the Fair Debt Collection Practices Act and state law. Having conducted de novo review of the record and the district court's construction of state law, *see Cross v. Monett R-I Bd. of Educ.*, 431 F.3d 606, 610 (8th Cir. 2005), we find no basis for reversal. Accordingly, we affirm, *see* 8th Cir. R. 47B, but we modify the dismissal of the breach-of-contract claims against Beachside Two-I Homeowners' Association to be without prejudice, *see Labickas v. Ark. State Univ.*, 78 F.3d 333, 334-35 (8th Cir. 1996) (per curiam).

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[1] The Honorable Ann D. Montgomery, United States District Judge for the District of Minnesota.

EIGHTH CIRCUIT ORDER DENYING PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No: 06-2997

Glenn S. Cohen,

Appellant

v.

Beachside Two-I Homeowners' Association, et al.,

Appellees

Appeal from U.S. District Court for the District of Minnesota - Minneapolis (0:05-cv-00706-ADM)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

May 22, 2008

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

DISTRICT COURT OPINION AND ORDER
11/17/2005

Glenn S. Cohen, Plaintiff, v. Beachside Two-I Homeowners' Association; Fredrick R. Krietzman; Felhaber, Larson, Fenlon & Vogt, A Professional Association; U.S. Bancorp, d/b/a U.S. Bank Home Mortgage, Defendants.

Civil No. 05-706 ADM/JSM [2]

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

2005 U.S. Dist. LEXIS 28536

November 17, 2005, Decided

SUBSEQUENT HISTORY: Reconsideration denied by, Judgment entered by, Dismissed by Cohen v. Beachside Two-I Homeowners' Ass'n, 2006 U.S. Dist. LEXIS 44978 (D. Minn., June 29, 2006)

COUNSEL: [*1] Glenn S. Cohen, pro se.

Thomas A. Gilligan, Jr., Esq., Murnane Brandt, St. Paul, MN, argued on behalf of Defendant Beachside Two-I Homeowners' Association.

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[2] This case was previously assigned to Magistrate Judge Arthur J. Boylan but has been reassigned to Magistrate Judge Janie S. Mayeron.

Paul C. Peterson, Esq., Lind, Jensen, Sullivan & Peterson, P.A., Minneapolis, MN, argued on behalf of Defendants Fredrick R. Krietzman and Felhaber, Larson, Fenlon & Vogt, P.A.

Charles N. Nauen, Esq., and David J. Zoll, Esq., Lockridge Grindal Nauen P.L.L.P., Minneapolis, MN, argued on behalf of Defendant U.S. Bancorp d/b/a U.S. Bank Home Mortgage.

JUDGES: ANN D. MONTGOMERY, U.S. DISTRICT JUDGE.

OPINION BY: ANN D. MONTGOMERY

OPINION

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

On July 11, 2005, oral argument before the undersigned United States District Judge was heard on Plaintiff Glenn S. Cohen's ("Cohen" or "Plaintiff") Motion for Partial Summary Judgment [Docket No. 20]. In his Complaint [Docket No. 1], Plaintiff Cohen alleges that Defendants Fredrick R. Krietzman ("Krietzman") and Felhaber, Larson, Fenlon & Vogt, P.A. ("Felhaber") violated the federal Fair Debt Collection Practices Act by, among other things, collecting attorney's fees in violation of Minnesota state law. Cohen also alleges that Defendant [*2] U.S. Bancorp d/b/a U.S. Bank Home

Mortgage ("U.S. Bank") [3] violated Minn. Stat. § 333.06 by failing to file an assumed name certificate. Finally, Cohen alleges state law breach of contract claims against Defendant Beachside Two-I Homeowners' Association ("Beachside").

On June 27, 2005, Cohen filed a Motion for Leave to Amend the Complaint to Plead [*3] Punitive Damages and to state additional causes of action [Docket No. 54]. On August 1, 2005, Cohen filed a second Motion for Leave to Amend the Complaint to allege additional evidence with respect to Count 13 in the Amended Complaint [Docket No. 66]. Magistrate Judge Arthur J. Boylan denied Plaintiff's Motion for Leave to Plead Punitive Damages and denied as moot Plaintiff's second Motion to Amend to assert additional evidence with respect to Count 13 of the Amended Complaint [Docket No. 80]. Cohen sought reconsideration, and on September 27, 2005, Judge Boylan issued an Order denying Plaintiff's Request for Reconsideration [Docket No. 82]. Plaintiff's Objection to Judge Boylan's Order followed on September 30, 2005 [Docket No. 83]. Finally, on October 20, 2005, Cohen filed a Mo-

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[3] In his Complaint, Cohen names "U.S. Bancorp, d/b/a U.S. Bank Home Mortgage" as a defendant. See Compl. In its Answer, Defendant U.S. Bank states that "U.S. Bancorp is a bank holding company and does not provide traditional banking or loan administration services, and, thus, is not a proper party defendant to this action. U.S. Bank Home Mortgage is a division of U.S. Bank National Association and also is not a proper party defendant. U.S. Bank National Association is the proper party defendant to this action." U.S. Bank Ans. P 4. Accordingly, this Order will refer to "U.S. Bank" rather than "U.S. Bancorp" as the properly named Defendant.

tion for Leave to Cite Additional Authority [Docket No. 94].

For the reasons set forth herein, Plaintiff's Motion for Partial Summary Judgment is denied, Plaintiff's Appeal to Judge Boylan's Order is denied in its entirety, except with regard to his ability to allege emotional distress damages as an element of his libel claim, and Plaintiff's Motion for Leave to Cite Additional Authority is denied.

[*4] II. BACKGROUND

A. The Parties

Plaintiff Glenn S. Cohen is presently a resident of Monmouth County, New Jersey. During the time period applicable to this matter, Cohen was a resident of Hennepin County, Minnesota. Compl. P 4. Defendant Beachside is a Minnesota non-profit corporation located in Plymouth, Minnesota. Beachside was created on January 29, 1982, to serve the common interests of the homeowners in the Beachside Two-I town home development located in Minnetonka, Minnesota. Id. PP 5-6. Defendant Krietzman is a Minnesota attorney employed by the Minneapolis law firm of Felhaber, Larson, Fenlon & Vogt, P.A. Id. PP 7, 11. Finally, Defendant U.S. Bank is a Delaware corporation with offices and banking locations in Minnesota. Id. PP 12-13.

B. Beachside and the Governing Documents

Beachside Two-I is a planned community in Minnetonka, Minnesota, comprised of single family town house style dwellings and "common areas." Cohen Aff. [Docket No. 23] Ex. A at 1-2. Each

owner becomes a member of the Beachside Two-I Homeowners Association ("Association") upon purchase of his property. Id. at 3. Each lot is subject to general annual assessments [*5] (to be paid monthly), master insurance premiums or assessments, and special assessments for capital improvements. Id. The assessments, together with interest, costs, and reasonable attorney's fees constitute a lien against the property, and each owner upon acceptance of a deed consents to foreclosure of the lien upon nonpayment of the lien obligation. Id.

Beachside is governed by three documents: a Declaration of Covenants, Conditions, and Restrictions ("Declaration"); By-Laws; and Rules and Regulations ("Rules"). See Cohen Aff. Exs. A, B, C. The Declaration sets forth the manner in which the three assessments will be calculated and paid. Cohen Aff. Ex. A at 3-7. The By-Laws contain a supremacy clause, stating that "in case of any conflict between the Declaration and these By-Laws, the Declaration shall control." Cohen Aff. Ex. B at 7. The By-Laws also give the Board of Directors the power to "adopt and publish rules and regulations governing the use of the Common Area and facilities, and the personal conduct of the Members and their guests thereon, and to establish penalties for the infraction thereof." Id. at 4.

C. Cohen's Payment of Monthly Assessments

[*6] Plaintiff Cohen purchased a Beachside town home, located at 5454 Sanibel Drive, and owned his town home from June 5, 1997, to November 19, 2004. See Angell Aff. [Docket No. 42] Ex. A. Cohen obtained a mortgage on his property

from U.S. Bank, and made monthly mortgage payments to "U.S. Bank Home Mortgage." See Cohen Aff. Exs. T, U. Like all other Beachside owners, upon purchase of his town home, Cohen became a member of the Association and was obligated to pay monthly assessments. Cohen regularly paid his monthly assessments without incident until September 1998, at which time Cohen failed to pay his monthly assessment. [4] See Cohen Aff. Ex. D. Cohen accounted for the delinquency the following month, however, by paying double the monthly assessment due. Id.

[*7] Cohen thereafter established a pattern of sometimes paying his monthly assessments and sometimes not. Id. Cohen would usually make up for his nonpayment by paying double the following month, or triple two months later, depending upon how many payments he had missed. Id. This pattern continued until June 2003, at which time Cohen ceased paying his monthly assessments altogether. Id. No assessments were paid on the Cohen property again until one year later, at which time U.S. Bank satisfied all debts owed by Cohen to the Association by paying off the lien against Cohen's property. See Cohen Aff. Ex. X.

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[4] The first three times Cohen failed to pay his monthly assessment, September 1998, November 1998, and January 1999, Cohen had a positive balance in his account with Beachside due to an initial credit payment. The monthly assessments owed during those months were deducted from his positive balance with Beachside and no penalties resulted. However, for the vast majority of the remaining months in which Cohen failed to pay his monthly assessments, the failure resulted in an immediate negative balance in his account with Beachside. See Cohen Aff. Ex. D.

D. The Late Fees

In November 1999, the Association began levying $ 10 late fees against Cohen's account as a result of late payment of his monthly assessments. Cohen Aff. Ex. D. A $ 10 late fee was assessed against Cohen's account twenty-one times in thirty-three months. Id. The fee for late payment of monthly assessments was raised to $ 20 in August 2002, and a late fee of $ 20 was assessed against Cohen's account thirteen times in eighteen months. Id.

In the early phase of the dispute, Cohen paid all late fees assessed against him, albeit not always [*8] on time. Cohen Aff. Ex. S. Cohen first noted his disagreement with the late fees by handwriting on an October 2002 Beachside account statement that "$ 20 late fee is probably an illegal penalty for a principal amount of only $ 153." Id. Cohen nonetheless continued to pay late fees assessed against him until January 2003, when he began sometimes paying the assessment amount due but not the late fees or legal fees. Id. This practice continued until he stopped making assessment payments altogether in June 2003. Cohen formally informed the Association that he refused to pay late fees imposed on his account in an April 8, 2003 letter to Beachside attorney Gregory Keller. Angell Aff. Ex. G.

Beachside changed the $ 20 late fee policy in February 2004 to a 6% interest rate charge on past due assessments. Cohen Aff. Ex. D. Thereafter, Cohen was charged $ 7.46 in February 2004, $ 8.15 in March 2004, $ 9.02 in April 2004, and $ 9.75 in May 2004. Id.

E. The Lien Foreclosure

The Declaration states that "any assessment not paid within thirty (30) days after the due date shall bear interest from the due date at the rate of six percent (6%) per annum. The Association may bring [*9] an action at law against the Owner personally obligated to pay the same, or foreclose the lien against the property." Cohen Aff. Ex. A at 7. On September 11, 2003, Krietzman informed Cohen by letter that the Felhaber law firm represented Beachside and that Cohen's account had been referred to Felhaber for collection. Cohen Aff. Ex. L. The letter stated that as of September 2003, Cohen owed $ 922.80 in unpaid general and insurance assessments, costs, and attorney's fees. Id. On October 18, 2003, Cohen responded to Krietzman's letter by asserting that he disputed the alleged debt owed and that Krietzman should no longer contact him or send him collection notices, pursuant to the Fair Debt Collection Practices Act. Cohen Aff. Ex. J.

On March 2, 2004, Beachside filed a Lien Statement with the Hennepin County Office of the Registrar of Titles, stating that Cohen owed $ 2,318.90 in unpaid general and insurance assessments, costs, and attorney's fees. Cohen Aff. Ex. E. On the same date, Beachside filed a Request for Notice of a Mortgage Foreclosure by Advertisement, Notice of Redemption Reduction, and Notice of Cancellation of Contract for Deed or Installment Contract ("Request for Notice"). [*10] Cohen Aff. Ex. F. The following day, Krietzman wrote a letter to Cohen to inform him that the Lien Statement

and Request for Notice had been filed. Krietzman advised Cohen that the Board of Directors of the Association ("Board") had voted on January 26, 2004, to foreclose the lien against Cohen, and that if Cohen did not pay his debt in full by March 15, 2004, the Association would most likely proceed with foreclosure. Angell Aff. Ex. I. Krietzman also informed Cohen that the Board had voted to accelerate his 2004 annual assessments in the event that he failed to pay any 2004 assessments for more than sixty days. Id. The assessment acceleration would become effective on March 15, 2004. Id.

On April 12, 2004, Beachside filed a Notice of Pendency to Foreclose Lien and Power of Attorney to Foreclose Lien. Cohen Aff. Ex. G. On April 13, 2004, Krietzman returned Cohen's check written to Beachside in the amount of $ 459. Krietzman Aff. [Docket No. 48] Ex. 9. Krietzman informed Cohen that Beachside was no longer prepared to accept partial payment from Cohen and was moving forward with the foreclosure proceeding. Id. On April 20, 2004, a Notice of Assessment Lien Foreclosure [*11] Sale ("the Notice") was published, announcing the pending foreclosure sale. Angell Aff. Ex. J; Krietzman Aff. Exs. 8, 10.

On May 5, Krietzman wrote to both Wells Fargo Bank Minnesota and Mercantile Bank, FSB, to inform them of the foreclosure sale. Krietzman Aff. Exs. 11-12. A title search had confirmed that these banks had an interest of their own in the property. Id. On May 14, 2004, Krietzman wrote a letter to Ashley Winkler of U.S. Bank, noting his understanding that U.S. Bank intended to pay off the lien against Cohen's property. Angell Aff. Ex. K.

Krietzman informed Winkler that the current amount of the lien was $ 5,920.08. Id. On May 17, 2004, Winkler wrote to Cohen, informing him that U.S. Bank had paid the lien amount, but that "the payment of this bill will be your responsibility in the future. Your escrow account will be analyzed reflecting this change, and your payment will be adjusted accordingly." Cohen Aff. Ex. X. On May 27, 2004, Beachside filed a Satisfaction and Release of Lien, stating that the lien had been satisfied when the debt was paid in full on May 14, 2004. Cohen Aff. Ex. H. Krietzman wrote to Cohen on June 8, 2004, to confirm that the lien had [*12] been satisfied and the Association had stopped foreclosure of the lien. Cohen Aff. Ex. N. On April 7, 2005, Cohen commenced this action.

III. DISCUSSION OF SUMMARY JUDGMENT MOTION

A. Standard of Review

Federal Rule of Civil Procedure 56(c) provides that summary judgment shall issue "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); see Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265

(1986). On a motion for summary judgment, the Court views the evidence in the light most favorable to the nonmoving party. Ludwig v. Anderson, 54 F.3d 465, 470 (8th Cir. 1995). The nonmoving party may not "rest on mere allegations or denials, but must demonstrate on the record the existence [*13] of specific facts which create a genuine issue for trial." Krenik v. County of Le Sueur, 47 F.3d 953, 957 (8th Cir. 1995).

B. Inadequate Time for Discovery

As an initial matter, Defendant Beachside alleges that Cohen's summary judgment motion is premature. Cohen filed his Complaint on April 7, 2005. U.S. Bank, the last Defendant to file an Answer, responded on May 19, 2005. Cohen then filed his motion for partial summary judgment on May 24, 2005, less than one month after the earliest responding Defendant had filed its Answer, and before the pre-trial conference or any discovery had taken place. As the Eighth Circuit has noted, "discovery does not have to be completed before a court can grant summary judgment, but summary judgment is proper only after the nonmovant has had adequate time for discovery." In re Temporomandibular Joint (TMJ) Implants Prods. Liab. Litig., 113 F.3d 1484, 1489-90 (8th Cir. 1997), citing Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). In this case, Plaintiff's motion for summary judgment was filed before there was any opportunity for discovery.

In his reply memorandum, Plaintiff relies on [*14] United States v. Casino Magic for the proposition that a party opposing summary judgment

who believes that he has not had adequate opportunity to conduct discovery must seek relief by showing "what specific facts *further discovery* might unveil." 293 F.3d 419, 426 (8th Cir. 2002) (emphasis added). Plaintiff fails to understand the significance of the phrase "further discovery." In Casino Magic, the court found that both parties had already been given the opportunity to engage in extensive discovery, as the discovery period had exceeded two years. Id. at 426-27. This is a wholly different factual scenario from the instant case where no discovery has yet occurred.

Although Plaintiff's motion is premature, the parties have extensively briefed the issues in Plaintiff's wide ranging mutli-count Complaint. Because many of the claims are entirely based on documents and there is no request for further discovery on some claims, the Court will reach the merits of the claims in an attempt to bring focus to this litigation as it proceeds through discovery.

C. Fair Debt Collection Practices Act ("FDCPA")

Cohen alleges that Defendants Krietzman [*15] and Felhaber violated the FDCPA by charging at-

torney's fees in violation of Minn. Stat. § 582.01. [5] The unfair practices section of the FDCPA states in relevant part:

> A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section: (1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.

15 U.S.C. § 1692f(1). Cohen essentially argues that Krietzman and Felhaber have violated both the "expressly authorized by the agreement" and the

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[5] In his memorandum of law, Cohen claims a violation of Minn. Stat. § 580.30. However, Cohen likely means to assert a violation of Minn. Stat. § 582.01 instead. Section 580.30 concerns the requirements for reinstatement of a mortgage when the amount due on a mortgage has been paid off prior to a foreclosure sale. While section 580.30 does incidentally mention the payment of attorney's fees as part of the amount due, the statute appears to be setting the minimum amount of attorney's fees that must be paid in order for the mortgage to be reinstated, rather than limiting the amount of attorney's fees that can be charged when a mortgage is reinstated.

"permitted by law" prongs of the statute. [6] Krietzman and Felhaber respond with three arguments. First, they allege that Minn. Stat. § 582.01 does not apply here because the statute concerns mortgages, and the debt at issue is a lien. Second, they argue that the principal case relied upon by Cohen, In re Smoots, 230 B.R. 140 (D. Minn. 1996), [*16] has been legislatively overruled by section 515B.3-116(h)(4) of the Minnesota Common Interest Ownership Act ("MCIOA"). Third, Krietzman and Felhaber allege that even if they were wrong on the law, the bona fide error defense of the FDCPA applies, absolving them of liability.

[*17] Krietzman and Felhaber's first argument is unpersuasive. While they correctly assert that all mortgages are liens but not all liens are mortgages, the lien in this case functions very much like a traditional mortgage. Although Cohen did not borrow money from the Association, he did contractually bind himself to a lien on his real property through the monthly association assessments. In the event that Cohen did not pay the lien amount, the Association had the power to foreclose the lien and sell the real property at a foreclosure sale. This procedure is very similar to a traditional mortgage foreclosure.

Krietzman and Felhaber's second argument is that section 515B.3-116(h)(4) of the MCIOA has legislatively overruled Smoots with regard to a cap

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[6] The parties focus their arguments on the "permitted by law" prong of the unfair practices test, rather than the "authorized by the agreement" prong. Although the governing documents mention the collection of reasonable attorney's fees, they do not state a specific amount, here the $ 5,920.08 charged.

on attorney's fees. Smoots interpreted an old version of section 515B.3-116(h)(4) that incorporated the attorney's fee provision in Minn. Stat. § 582.01, subd.1a and held that the foreclosing attorneys were entitled to a flat fee of $ 500. In re Smoots, 230 B.R. 140, 142-43 (D. Minn. 1996). After Smoots was decided, the legislature amended the MCIOA so that section 515B.3-116(h)(4)(ii) [*18] of the MCIOA now states: "in a foreclosure by advertisement under chapter 580, the foreclosing party shall be entitled to costs and disbursements of foreclosure and attorneys fees authorized by the declaration or bylaws, notwithstanding the provisions of section 582.01, subdivisions 1 and 1a." However, Section 515B.1-102(b)(3) of the MCIOA states "this chapter shall not apply to cooperatives and planned communities created prior to June 1, 1994; except by election . . . ." Beachside was created prior to 1994 and none of the parties have submitted any evidence to show that Beachside has elected to be governed by the MCIOA. Cohen Aff. Ex. A. Therefore, as admitted by Defendants, the MCIOA does not apply in this case and does not create a defense.

Krietzman and Felhaber's third argument does have merit. Section 582.01 is the best fit for statutory authority to this case. Minn Stat. 582.01, subd. 1 states as follows:

> The mortgagor may, in the mortgage, covenant to pay or authorize the mortgagee to retain an attorney's fee in case of foreclosure, but such fees in case of foreclosure by advertisement shall not exceed the following amounts, and any

> provision [*19] for fees in excess thereof shall be void to the extent of the excess: [schedule omitted].

Minn. Stat. § 582.01, subd.1. Section 582.01, subd. 1a, modifies subd. 1 as follows: notwithstanding subdivision 1 to the contrary, the minimum fee for foreclosure by advertisement of mortgages executed after July 31, 1992, is $ 500. Minn. Stat. § 582.01, subd. 1a. Beachside's Declaration dictates that "every Owner of a lot by acceptance of a deed therefore further consents to the foreclosure of any such lien by action or by advertisement or otherwise as provided by applicable law for the foreclosure of a real estate mortgage." Cohen Aff. Ex. A at 4. Beachside is required by its governing documents to follow the mortgage foreclosure by advertisement statutes, and indeed they did so in this case by filing the Request for Notice pursuant to Minn. Stat. § 580.032.

The application of section 582.01, which caps the amount of attorney's fees recoverable in a mortgage foreclosure by advertisement at a very small amount, renders Krietzman and Felhaber in violation of the FDCPA if they have collected an amount of [*20] attorney's fees greater than that permitted by law. Whether there is a statutory violation depends on determining 1) the maximum amount of fees chargeable pursuant to section 582.01, and 2) the amount Krietzman and Felhaber collected in mortgage foreclosure by advertisement fees.

Section 582.01, subdivision 1 sets forth a schedule of *maximum* fees chargeable, depending on the

original principal amount secured by mortgage. See § 582.01, subd. 1 (emphasis added). Subdivision 1a, on the other hand, which was added to the statute in 1992, states that "the *minimum* fee for foreclosure by advertisement of mortgages executed after July 31, 1992, is $ 500." § 582.01, subd. 1a (emphasis added). The minimum fee in subdivision 1a also happens to exceed all of the maximum fees set forth in subdivision 1, save for the addition of $ 35 to the base maximum amount for each additional $ 5,000 of a mortgage greater than $ 10,000, which could bring the total amount of attorney's fees chargeable to greater than $ 500. A plain language interpretation of subdivision 1a suggests that there is no set maximum amount of attorney's fees chargeable, and an attorney may set his fee at any amount above [*21] $ 500. However, reading subdivision 1a in such a fashion would essentially nullify subdivision 1, a reading that can not stand, since subdivision 1 has not been repealed or modified. The most logical interpretation of the statute, which results in giving effect to all of the statute's subdivisions, is that the minimum amount of attorney's fees chargeable is $ 500, and the minimum amount can be increased by $ 35 for each $ 5,000 increase in a mortgage amount greater than $ 10,000. In this case, given a lien amount of $ 5,920.08, the most Krietzman and Felhaber could have charged for the mortgage foreclosure by advertisement proceeding under section 582.01 is $ 500.

Next, Krietzman and Felhaber allege that not all of the attorney's fees in this case were charged in connection with the lien foreclosure proceeding. Specifically, Krietzman asserts that all of the at-

torney's fees charged prior to February 2004 were related solely to collection activities, and attorney's fees for foreclosure activities were not billed until February 2004. Krietzman Aff. at 6. Taking Krietzman's assertions as true, the amount of attorney's fees charged by Krietzman in connection with the foreclosure proceedings [*22] was $ 1,364.[7] See Krietzman Aff. at 5-6. This amount exceeds the $ 500 limit "permitted by law" in section 582.01.

However, as Krietzman and Felhaber argue, they may be eligible for the protection of the bona fide error defense. Section 1692k(c) of the FDCPA states:

> A debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

15 U.S.C. § 1692k(c). The Eighth Circuit has held that the bona fide error defense is not available for mistakes of law. Picht v. Jon R. Hawks, Ltd., 236 F.3d 446, 451-52 (8th Cir. 2001), citing Hulshier v. Global Credit Servs., Inc., 728 F.2d 1037, 1038 (8th Cir. 1984). [*23] However, the Eighth Circuit has not elaborated on its reasoning for excluding mistakes of law from the bona fide error defense, other

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[7] This number is arrived at by adding the total amount of attorney's fees charged since February 2004. Krietzman Aff. at 5-6.

than to say that it accepts the Ninth Circuit analysis. See Baker v. G.C. Servs. Corp., 677 F.2d 775, 779-80 (9th Cir. 1982). In Baker, the Ninth Circuit removed mistakes of law from the FDCPA bona fide error defense by analogizing it to the bona fide error defense in the Truth In Lending Act ("TILA"). Id. at 779. The court noted that "it has been uniformly held that unintentional 'clerical errors . . . are the only violations this section (of the TILA) was designed to excuse.'" Id.

The Seventh and Tenth Circuits have since parted company with the Ninth Circuit's analysis in Baker, and have come to the opposite conclusion that the FDCPA bona fide error defense does include mistakes of law. See Nielsen v. Dickerson, 307 F.3d 623, 640-42 (7th Cir. 2002); Johnson v. Riddle, 305 F.3d 1107, 1121-24 (10th Cir. 2002). In Johnson, the Tenth Circuit noted that most of the courts that held that the bona fide error defense does not apply to mistakes of law were following the Ninth [*24] Circuit's decision in Baker. Johnson, 305 F.3d at 1122. The Johnson court explained that the TILA analogy in Baker was faulty because the bona fide error provision in the TILA statute expressly defined bona fide errors as including "clerical" type errors and not including "errors of legal judgment," while the FDCPA bona fide error section contains no such express inclusions or exclusions. Id. at 1122-23, citing Jenkins v. Heintz, 124 F.3d 824, 832 n.7 (7th Cir. 1997). The court also found that the limited legislative history of the FDCPA bona fide error defense suggested that legal errors were intended to be included: "A debt collector has no liability, however, if he violates the

act *in any manner, including with regard to the act's coverage,* when such violation is unintentional and occurred despite procedures designed to avoid such violations." Id. at 1123, citing S. Rep. No. 95-382 at 5.

Given the split in the Circuits and the Eighth Circuit's lack of any discussion of why a bona fide error defense might not apply to a mistake of law in the FDCPA context, the claim should remain for discovery as to whether the [*25] error was intentional or unintentional, and whether procedures were in place to avoid such errors. The claim should also remain for discovery as to the exact amount charged in attorney's fees solely related to foreclosure activities. Plaintiff's motion for summary judgment on the FDCPA claim is denied.

D. Claims Against Defendant Beachside

Plaintiff Cohen asserts a number of state law claims against Defendant Beachside based on breach of contract.

1. Late Fees of $ 10 and $ 20

In count one, Cohen argues Beachside lacked the authority to charge $ 10 and $ 20 late fees for past due monthly assessments because nothing in the Declaration or the By-Laws granted Beachside

the authority to charge such late fees. [8] To the extent that the Rules authorized a late fee charge for past due monthly assessments, the rule is void because it conflicts with the Declaration and By-Laws. Defendant Beachside responds that while the Declaration and By-Laws may not affirmatively grant the Association the power to charge $ 10 and $ 20 late fees, there is nothing in the Declaration or By-Laws that prohibits the Association from charging such late fees either.

[*26] Article IV, Section 10 of the Declaration states "any assessment not paid within thirty (30) days after the due date shall bear interest from the due date at the rate of six percent per annum." Cohen Aff. Ex. A at 7. Article XI, Section 11.1 of the By-Laws states "any assessments which are not paid when due shall be delinquent. If the assessment is not paid within thirty days after the due date, the assessment shall bear interest from the date of delinquency at the rate of six percent (6%) per annum . . . ." Cohen Aff. Ex. B at 7. Article VII, Section 7.1 of the By-Laws states that "the Board of Directors shall have power to: (a) adopt and publish rules and regulations governing the use of the Common Area and facilities, and the personal con-

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[8] In his second and third counts against Defendant Beachside, Plaintiff Cohen alleges that the $ 10 and $ 20 late fees charged by Defendant Beachside are an unenforceable penalty and void because the condition precedent notice was not received. However, Plaintiff's second and third "counts" are really alternative arguments for the proposition that the $ 10 and $ 20 late fees charged by Beachside were unauthorized. Because an analysis of the legality of the imposition of the $ 10 and $ 20 late fees disposes of the issue, there is no need to address Plaintiff's alternative arguments.

duct of the Members and their guests thereon, and to establish penalties for the infraction thereof." Cohen Aff. Ex. B at 4. The Rules state "dues are payable on the first of each month. Dues not received by the 10th of the month are subject to late fees." Cohen Aff. Ex. C at 2.

The Declaration and the By-Laws give the Board the authority to charge late fees at the rate of 6% per annum for any assessment that is past due by thirty days, but late [*27] fees of $ 10 or $ 20 are not explicitly mentioned. The By-Laws do allow the Board to publish rules regarding the common area, but do not expressly give the Board the power to make rules regarding any other subject. A late fee for past due assessments does not arise from an issue with the common area, and therefore, the Board did not have the authority to promulgate a rule regarding the collection of late fees. While the Board could have amended its Declaration or By-Laws to provide for the collection of $ 10 and $ 20 late fees, they chose not to do so, and as a result of the Board's failure to follow the procedures established by their own governing documents, the $ 10 and $ 20 late fees collected in this case are void as unauthorized by Beachside's governing documents.

Defendant Beachside, however, contends that even if the governing documents do not permit Beachside to collect $ 10 and $ 20 late fees for past due assessments, Plaintiff's recovery is limited by the voluntary payment doctrine. "The voluntary payment doctrine is a long-standing doctrine of law, which clearly provides that one who makes a payment voluntarily cannot recover it on the

ground that he was under no legal [*28] obligation to make the payment." Indep. Glass Ass'n, Inc. v. Safelite Group, Inc., 2005 U.S. Dist. LEXIS 18539, No. 05-238, 2005 WL 2093035, at *10 (D. Minn. Aug. 26, 2005), citing Hanson v. Tele-Communications, Inc., 2000 Minn. App. LEXIS 1023, No. C7-00-534, 2000 WL 1376533, at *3 (Minn. Ct. App. Sept. 26, 2000).

> The rule is that money paid voluntarily, with full knowledge of the facts, cannot be recovered back. If a man chooses to give away his money, or to take his chances whether he is giving it away or not, he cannot afterwards change his mind; but it is open to him to show that he supposed the facts to be otherwise, or that he really had no choice.

Hanson at *3, citing Joannin v. Ogilvie, 49 Minn. 564, 52 N.W. 217, 217 (Minn. 1892). Plaintiff Cohen contends his payment of late fees was never voluntary, but was disputed from the beginning. He asserts that he refused to pay late fees in January 2000, only to be told that if he did not pay the late fees in question, he would be subject to more late fees. However, Plaintiff offers no evidence on this point, and Plaintiff's own statement of account shows that he in fact paid the late fees charged in January 2000. Cohen Aff. Ex. D. [*29] A handwritten note on Plaintiff's October 2002 account statement that "$ 20 late fee is probably an illegal penalty for a principal amount of only $ 153 is the first evidence of contest of the fee. Cohen Aff. Ex. S. However, Cohen continued to pay late fees after

expressing that sentiment. Cohen Aff. Ex. D. Cohen did not cease paying late fees assessed against him until January 2003. Id. On April 8, 2003, Cohen wrote a letter to Beachside attorney Gregory Keller, stating that he believed the late fees charged to be "not just unconscionable but probably illegal." Angell Aff. Ex. G. Cohen further stated that he "refuse[d] to pay the late fees alleged as due in your notice dated March 18, 2003." Id.

Cohen further contends because Beachside misrepresented to him a right to collect the disputed late fees and legal fees, and even the general assessments themselves, when it did not have that right, Beachside is prohibited from the defense of the voluntary payment doctrine. However, it is clear from the Rules that Beachside itself believed it had the authority to charge late fees for past due assessments. Furthermore, if Cohen disputed the late fees, he had options other than just [*30] acquiescing and paying the fees. The Rules establish a hearing procedure in which residents have the right to challenge any sanctions imposed upon them. See Cohen Aff. Ex. C at 7. While Cohen had a copy of the Rules and presumably knew their contents, he never availed himself of the hearing procedure.

In conclusion, although Cohen is entitled to summary judgment on his claim that the $ 10 and $ 20 late fees were not authorized by the governing documents, the voluntary payment doctrine precludes Cohen from recovering any late fees that were voluntarily paid. Therefore, Cohen is entitled

to recover only late fees that he refused to pay beginning in January 2003. [9]

[*31] 2. Attorney's Fees Collected in the Lien Amount

In counts four and five, Plaintiff Cohen alleges that the Declaration did not grant authority to Beachside to assess attorney's fees and Beachside collected more fees than permitted by Minnesota statute. Although Plaintiff's allegations are listed as separate counts, they are essentially alternative arguments for the same proposition.

First, Plaintiff argues that the Declaration did not authorize the collection of attorney's fees. However, Article IV, Section 1 of the Declaration states as follows:

> The general annual assessments, master insurance assessments and the special assessments for capital improvements, together with interests, costs, and *reasonable attorney's fees,* shall be a charge on the land and shall be a continuing lien upon the property against which each such assessment is made.

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[9] It is unclear from the affidavits exactly how much in late fees was charged to Cohen from January 2003 onward. According to the affidavits, Cohen was charged a total of $ 194.38 from January 2003 through July 2003 and January 2004 though May 2004. Whether Cohen was charged late fees from August 2003 through December 2003 is not reflected in the documents of record. Document discovery may clarify the amount to which Plaintiff is entitled within the parameters of the liability established by this ruling.

> Each such assessment, together with interest, costs, and *reasonable attorney's fees,* shall also be the personal obligation of the person who was the Owner of such property at the time when the assessment fell due. . . . Each assessment, together with interest, costs and *reasonable attorney's fees,* shall also be the [*32] individual obligation of the person who was the Owner of such Lot at the time the assessments become due and such personal obligation shall not pass to such Owner's successors in title unless expressly assumed by them.

Cohen Aff. Ex. A at 3-4 (emphasis added). Article IV, Section 9 of the Declaration states the following with regard to lien foreclosure "upon any such foreclosure, the Owner shall be required to pay the *costs and expenses* thereof, and such costs and expenses shall also constitute a lien on such Lot. Id. at 6 (emphasis added). Article IX, Section 11.1 of the By-Laws states:

> If the assessment is not paid within thirty days after the due date, the assessment shall bear interest from the date of delinquency at the rate of six percent (6%) per annum, and the Association may bring an action at law against the Owner personally obligated to pay the same or foreclose the lien against the property, and interest, costs and *reasonable attorney's fees* of any such action shall be added to the amount of such assessment.

Cohen Aff. Ex. B at 7 (emphasis added). Plaintiff argues the Declaration and By-Laws conflict with one another, and that neither [*33] document explicitly authorizes the collection of attorney's fees. A fair reading of the Declaration and the By-Laws as a whole evinces an intent to authorize the Board to collect attorney's fees from residents as part of the assessment lien on the property. While it is true that the term "reasonable" is somewhat amorphous, it is not so vague as to prohibit the collection of attorney's fees in this case. See Krietzman Aff. at 6.

Plaintiff also argues that attorney's fees can not be collected because the governing documents only authorize the collection of attorney's fees "upon such foreclosure," and, although a foreclosure proceeding was instituted, an actual foreclosure sale never occurred because U.S. Bank paid off the lien amount in advance of the sale date. As Defendant Beachside correctly responds, the term "foreclosure" does not have as narrow a meaning as Plaintiff contends. Black's Law Dictionary defines "foreclosure" as "[a] legal proceeding to terminate a mortgagor's interest in property, instituted by the lender (the mortgagee) either to gain title or to force a sale in order to satisfy the unpaid debt secured by the property." Black's Law Dictionary 658 (7th ed. 1999). [*34] "Foreclosure sale" is defined as "the sale of mortgaged property, authorized by a court decree or a power-of-sale clause, to satisfy the debt." Id. at 1338. Therefore, because the term "foreclosure" encompasses the entire foreclosure process rather than just the completed foreclosure

sale itself, Defendants were entitled to collect attorney's fees.

Second, Plaintiff argues that the attorney's fees collected violate Minn. Stat. § 582.01. As discussed above with regard to the claims asserted against Krietzman and Felhaber, the attorney's fees charged specifically for the foreclosure proceeding are void to the extent that they surpass the maximum amount permitted by Minn. Stat. § 582.01. Unlike Defendants Krietzman and Felhaber, Beachside can not rely on the bona fide error defense of the FDCPA because Beachside is not charged with violating the FDCPA. Discovery should focus on the amount of attorney's fees expended specifically on the lien foreclosure in excess of the statutory maximum as well as the potential applicability of the voluntary payment doctrine.

3. Beachside's Lack of Authority to Increase Assessment Payments

[*35] In count eight, Cohen contends that the assessment increases charged by the Board violated the provisions of the governing documents. Cohen arrives at this conclusion by a piecemeal, section-by-section interpretation of the governing documents. However, an analysis of the Declaration as a whole reveals that Beachside's interpretation of the Declaration is correct.

Sections 3, 4, and 5 of Article IV enunciate the ways in which the general, master insurance, and special assessments are to be calculated. Section 3 states in relevant part that "the Board of Directors may fix the general annual assessment to an amount not in excess of the maximum," "the maxi-

mum general assessment may be increased each year not more than 5% above the maximum assessment for the previous year without a vote of the membership," and "the maximum general annual assessment may be increased above 5% by a vote of two-thirds (2/3) of each class of members who are voting in person or by proxy, at a meeting duly called for this purpose." Section 4 states that "the Board of Directors shall fix the master insurance premium or assessment at an amount as defined by competitive bids." Section 5 states that the Association [*36] may only levy special assessments "provided that any such assessment shall have the assent of two-thirds (2/3) of the votes of each class of members who are voting in person or by proxy at a meeting duly called for this purpose."

Section 6 of Article IV requires that "written notice of any meeting called for the purpose of taking any action authorized under Section 3, 4 or 5 shall be sent to all members and all First Mortgagees of record not less than 15 days nor more than 60 days in advance of the meeting," and that a quorum must be present at such meeting. Cohen interprets Section 6 to require that a meeting be called for any action that is authorized by Sections 3, 4, or 5. He argues because Beachside did not call a meeting for times that it increased the monthly assessments by less than 5%, it violated the Declaration.

Section 6 does not require a meeting for *any* action taken under Sections 3, 4, or 5. Rather, Section 6 requires that *when a meeting is required* for the purpose of taking an action under Sections 3, 4, or 5, then notice of the meeting must be sent out and a quorum must be present at the meeting. Any

other interpretation simply doesn't make sense. Section [*37] 3 authorizes the Board to increase the annual assessment unilaterally as long as the increase does not exceed 5%. Similarly, Section 4 authorizes the Board to unilaterally fix the master insurance assessment according to competitive bids. No meeting or vote of the membership is required to take either action, and therefore, it does not follow that the Board is required to send out notices and call a meeting. Section 6 only applies to situations under Sections 3, 4, or 5 when the Board is required to call a meeting and secure a vote of the membership, such as when the Board desires to raise the annual assessment by more than 5%, or when the Board desires to levy a special assessment.

In this case, the Board never increased the general annual assessments by more than 5% during the time that Cohen owned his town home. See Angell Aff. Ex. H. The Board set master insurance assessments according to competitive bids, pursuant to the governing documents. There are no allegations that the Board charged special assessments during this time. Based on the record before the court, the assessments charged to Cohen appear to be consistent with Beachside's governing documents. Summary judgment [*38] for the Plaintiff with respect to count eight is denied.

4. Lien Statement and Attorney's Fees Void Because No Amount Owed to Beachside

In count six, Plaintiff disputes the amount of money he allegedly owed to Beachside and claims that in actuality, Beachside owed money to him.

Essentially, Cohen argues that by prevailing on all of his asserted claims and subtracting from his account all of the late fees, legal fees, and increased assessments ever charged to him, his account would actually hold a positive balance, reflecting the amount he had overpaid to Beachside. Given the legal deficiencies in his arguments as discussed supra, there is no basis for summary judgment on this claim.

E. Claim Against Defendant U.S. Bank

Plaintiff alleges during his ownership of 5454 Sanibel, his monthly mortgage statements contained the name "U.S. Bank Home Mortgage," and each month he wrote mortgage checks payable to that same entity. Plaintiff argues that Defendant U.S. Bank National Association violated Minn. Stat. § 333.01 by doing business as U.S. Bank Home Mortgage without filing a certificate of assumed name with the Minnesota Secretary of State. [*39] [10] Defendant responds that U.S. Bank Home Mortgage is a division of U.S. Bank National Association. Because U.S. Bank National Association holds the sole interest in U.S. Bank Home Mortgage, U.S. Bank National Association argues it is not required to file a certificate of assumed name. The name "U.S. Bank Home Mortgage" sets forth the name of every person with a legal interest in the business.

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[10] Cohen alleges in his Complaint that U.S. Bank violated section 333.06, which essentially states that if a person violates section 333.01 and subsequently defends against a civil action, the plaintiff is entitled to $ 250. For purposes of resolving the issue in this case, however, the pivotal question is whether U.S. Bank has violated section 333.01.

Minn. Stat. § 333.01 subd. 1 states that:

> No person shall hereafter carry on or conduct or transact a commercial business in this state under any designation, name, or style, which does not set forth the true name of every person interested [*40] in such business unless such person shall file in the office of the secretary of state, a certificate setting forth the name and business address under which the business is conducted or transacted, or is to be conducted or transacted, and the true name of each person conducting or transacting the same, with the address of such person.

Minn. Stat. § 333.01 subd. 1. Plaintiff misinterprets Minn Stat. § 333.01. The statute does not require all businesses doing business under a different name to file a certificate of assumed name with the secretary of state. Rather, the statute merely requires businesses doing business under a different name *that also does not set forth the true name of every person interested in the business* to file a certificate of assumed name with the secretary of state. Section 333.001 defines "true name" with respect to corporations as "the full corporate name as stated in its articles, if a corporation." Minn. Stat. § 333.001. The name "U.S. Bank Home Mortgage" appears to set forth the name of every person interested in U.S. Bank Home Mortgage--namely, U.S. Bank National [*41] Association. However, neither Cohen nor U.S. Bank has submitted any documentary evidence of the true name of U.S. Bank under

its articles of incorporation. Therefore, Plaintiff's motion for summary judgment is denied as material facts remain in issue.

IV. DISCUSSION OF APPEAL OF MAGISTRATE'S ORDER

A. Standard of Review

In reviewing an Order of a nondispositive pretrial matter, the district court "shall consider such objections and shall modify or set aside any portion of the Magistrate Judge's order found to be clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A); see also D. Minn. LR 72.2(a). The standard of review is extremely deferential. Reko v. Creative Promotions, Inc., 70 F. Supp. 2d 1005, 1007 (D. Minn. 1999). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Chakales v. Commissioner of Internal Revenue, 79 F.3d 726, 729 (8th Cir. 1996).

B. Standard Applied by Judge Boylan

As an initial matter, Cohen objects to the standard [*42] applied by Judge Boylan to determine whether or not Cohen should be granted leave to amend his Complaint. Cohen alleges that Judge Boylan improperly applied a summary judgment standard rather than a motion to dismiss standard.

Federal Rule of Civil Procedure 15(a) provides that leave to amend "shall be freely given when justice so requires." There is, however, "no absolute right to amend and a finding of 'undue delay, bad

faith, or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the non-moving party, or futility of the amendment' may be grounds to deny a motion to amend." Doe v. Cassel, 403 F.3d 986, 990-91 (8th Cir. 2005); see also Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962). "Likelihood of success on the new claim or defenses is not a consideration for denying leave to amend unless the claim is clearly frivolous." Becker v. Univ. of Neb., 191 F.3d 904, 908 (8th Cir. 1999). In any event, the grant or denial of a motion for leave to amend is within the discretion of the court. Id.

It is well settled that "futility" alone is a basis [*43] for denying a motion to amend a complaint. Also, while the Eighth Circuit has essentially held that summary judgment is not ordinarily a proper standard upon which to deny leave to amend, the likelihood of success on the merits may be considered if the claim is clearly frivolous. In this case, Judge Boylan denied Plaintiff's proposed amendments on the ground of futility, as Plaintiff's claims were so devoid of any legal or evidentiary basis as to render them essentially frivolous. Judge Boylan also noted that a court may raise summary judgment sua sponte, and Plaintiff's claim fails under either the pleadings amendment standard or the summary judgment standard. See Kellar v. Von Holtum, 568 N.W.2d 186, 192 (Minn. Ct. App. 1997). This Court concludes that Judge Boylan's application of the summary judgment standard was not clearly erroneous or contrary to law within the context of this case, whether raised on Judge Boy-

lan's own initiative or applied in the face of frivolous proposed amendments.

C. Denial of Additional FDCPA Claims

Plaintiff first requests leave to amend to add two counts alleging additional violations of the FDCPA by Defendants Krietzman [*44] and Felhaber. Specifically, Cohen alleges that the letters to Wells Fargo Bank Minnesota and Mercantile Bank, FSB, on May 5, 2004, to inform those entities about the impending lien foreclosure sale were unauthorized third party communications in violation of 15 U.S.C. § 1692c(b) and contained threats to take unlawful action in violation of 15 U.S.C. § 1692e(5); the May 14, 2004 letter to Ashley Winkler of U.S. Bank, confirming the understanding that U.S. Bank wished to pay off the lien amount, violated 15 U.S.C. § 1692c(b) as well as several provisions of § 1692e relating to the use of false representation to collect a debt, and provisions of 1692f relating to the use of unfair means to collect a debt; and the June 8, 2004 letter from Krietzman to Cohen, informing Cohen that U.S. Bank had satisfied the lien amount and the foreclosure sale had been halted, contained false representations in violation of 15 U.S.C. § 1692e(2)(A).

Judge Boylan found as a matter of law that the letters dated May 5 and May 14, 2004, were sent in connection with lien enforcement rather than debt collection [*45] and therefore outside the reach of the FDCPA. See Rosado v. Taylor, 324 F. Supp. 2d 917, 924 (N.D. Ind. 2004). The June 8, 2004 letter was also connected to lien foreclosure rather than debt collection, but even if it could be construed as

a letter related to debt collection within the meaning of the FDCPA, 15 U.S.C. § 1692c(c)(1) specifically authorizes such a letter to advise an individual that the debt collector is no longer pursuing collection activities.

Cohen contends mortgage foreclosures are not exempt from the FDCPA, and relies on cases from the Second, Third, and Eleventh circuits. See Piper v. Portnoff Law Assocs., Ltd., 396 F.3d 227 (3rd Cir. 2005); In re Martinez, 311 F.3d 1272 (11th Cir. 2002); Romea v. Heiberger & Assocs., 163 F.3d 111 (2nd Cir. 1998). The cases are either factually distinguishable or inapposite. All three cases involve situations in which communications were sent directly to the debtor in question, and even if the mailing discussed other subjects or contained other types of communications, all were direct attempts to collect debt within the meaning of the FDCPA. [*46] In the instant case, the letters sent on May 5, 2005 were sent to financial institutions rather than Cohen and were not attempts to collect debt. Rather, they were notices informing institutions with interests in the Cohen property of the impending foreclosure sale. The May 14 letter was merely an exchange of information with Defendant U.S. Bank, confirming that U.S. Bank intended to pay off the lien amount. Finally, even if it does fall within the ambit of the FDCPA, the June 8 letter is clearly authorized by 15 U.S.C. § 1692c(c)(1). Therefore, this Court finds that Judge Boylan's Order with respect to the proposed additional FDCPA claims is not clearly erroneous or contrary to law.

D. Denial of Abuse of Process Claim

Plaintiff moved to add a claim of abuse of process against Defendants Beachside, Krietzman, and Felhaber, asserting that the collection of unauthorized fees was clearly Krietzman's purpose in pursuing the foreclosure action. The elements of abuse of process are 1) the existence of an ulterior purpose and 2) the act of using the process to accomplish a result outside the scope of the proceeding in which the process was issued. Hoppe v. Klapperich, 224 Minn. 224, 28 N.W.2d 780, 786 (Minn. 1947). [*47] Judge Boylan denied Cohen's request to amend to allege a claim for abuse of process upon concluding that Plaintiff has presented no evidence to support the element that the collection of fees was an ulterior motive behind the foreclosure action. Rather, all evidence suggests that Krietzman was merely doing the job he was hired to do, and pursued foreclosure action as a result of Cohen's failure to pay assessments, costs, and attorney's fees. The Court adopts Judge Boylan's findings and concludes that they are not clearly erroneous or contrary to law.

E. Denial of Conversion Claim

Cohen also seeks to allege a claim for conversion against the four Defendants with respect to the money taken from his escrow account at U.S. Bank to pay off the lien amount. Cohen alleges his permission was required and that Defendants Krietzman and Felhaber demanded funds that they knew exceeded the maximum amount of attorney's fees permitted by statute. Cohen objects to Judge Boylan's conclusion that the release or possession of escrow funds was legally justified under provisions

of contract and/or mortgage documents which established the relationships between the parties. Judge Boylan further [*48] determined that Cohen's claim for conversion would be futile.

Conversion is "an act of willful interference with the personal property of another, done without lawful justification, by which any person entitled thereto is deprived of use and possession." Christensen v. Milbank Ins. Co., 658 N.W.2d 580, 585 (Minn. 2003). Where possession is held through proper legal channels, a claim for conversion will not lie. See Naegle Outdoor Adver., Inc. v. Minneapolis Cmty. Dev. Agency, 551 N.W.2d 235, 238 (Minn. Ct. App. 1996); see also Balasuriya v. Bemel, 617 N.W.2d 596, 601 (Minn. Ct. App. 2000). Plaintiff has presented no evidence to support a claim that Defendants interfered with Plaintiff's escrow account funds through any means other than legally justified channels. Plaintiff's claim for conversion is futile and therefore Judge Boylan's holding with respect to the conversion claim is adopted.

F. Denial of Negligent Infliction of Emotional Distress Claim

Plaintiff objects to Judge Boylan's denial of his motion to add a claim for negligent infliction of emotional distress. Judge Boylan held that Cohen's claim for negligent [*49] infliction of emotional distress was futile and that his allegations that Defendants' behavior caused him to be worried, upset, and nervous were facially insufficient. Plaintiff claims he falls within an exception to the zone of danger rule, allowing a plaintiff to recover for men-

tal anguish and suffering when his rights have been directly and tortiously invaded. Defendant Beachside responds that to the extent that Cohen derivatively claims negligent infliction of emotional distress based upon his defamation claim, the claim must fail because Cohen's defamation claim will also fail.

In Lickteig v. Alderson, Ondov, Leonard & Sweeten, the Minnesota Supreme Court clarified the law in Minnesota with respect to claims for emotional distress:

> In tort cases, emotional distress may be an element of damages in only three circumstances. First, a plaintiff who suffers a physical injury as a result of another's negligence may recover for the accompanying mental anguish. Second, a plaintiff may recover for negligent infliction of emotional distress when physical symptoms arise after and because of emotional distress, if the plaintiff was actually exposed to physical harm as a result [*50] of the negligence of another (the "zone-of-danger" rule). Finally, a plaintiff may recover emotional distress damages when there has been a 'direct invasion of the plaintiff's rights such as that constituting slander, libel, malicious prosecution, seduction, or other like willful, wanton, or malicious conduct.'

556 N.W.2d 557, 560 (Minn. 1996). Plaintiff has not asserted that he was ever placed in any sort of physical danger by Defendants or suffered any type of physical harm. Thus, the first two circumstances with physical injury or zone of danger are inapplicable. However, Plaintiff may have a derivative claim for emotional distress damages if he is able to prove an underlying direct invasion of his rights by libel as asserted against Beachside. The viability of Plaintiff's libel claim in his initial Complaint has not yet been the subject of a motion. While Plaintiff's libel claim may ultimately be unsuccessful, as long as a libel claim remains in Plaintiff's Complaint, Plaintiff may allege a derivative emotional damages claim. Therefore, Judge Boylan's ruling disallowing the negligent infliction of emotional distress claim is reversed and Plaintiff may assert [*51] it against Defendant Beachside as a derivative claim premised on his libel claim. Judge Boylan's ruling with respect to the negligent infliction of emotional distress claim is otherwise adopted.

G. Denial of Invasion of Privacy by Publication of Private Facts Claim

Plaintiff objects to Judge Boylan's refusal to allow him to add a claim for invasion of privacy by publication of private facts. The claim focuses on the minutes from two board meetings in which Beachside stated by inference that Cohen was delinquent in paying his assessments. The minutes were allegedly sent to the members of the Beachside community. Judge Boylan concluded that Cohen's claim was futile because the matter at issue was not communicated to the public at large

and is not highly offensive to a reasonable person. Cohen objects that not only was the matter published in Beachside's newsletter and sent to all members of the Beachside community, but the Beachside members subsequently passed the newsletter along to friends and acquaintances. Defendant Beachside responds that there is no evidence that the minutes were distributed to anyone other than members of Beachside.

To state a claim for invasion of [*52] privacy by publication of private facts, the matter publicized must be of a kind that would be highly offensive to a reasonable person, and is not of legitimate concern to the public. Bodah v. Lakeville Motor Express, Inc., 663 N.W.2d 550, 553 (Minn. 2003). Publicity means that "the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." Id. at 557, citing Restatement (Second) of Torts § 652D cmt. a. In Bodah, the court held that a defendant's fax of 204 employees' social security numbers to sixteen company managers in six different states did not constitute publication to the public or to so large a number of persons that the matter must be regarded as substantially certain to become public. Id. at 557-58. The court also held that a general allegation that the information is possibly accessible to unknown individuals fails to aver publicity. Id. at 558.

Here, Plaintiff has alleged that the meeting minutes were mailed to members of the Beachside [*53] community, "a small community of about fifty households in a small geographic area." Am.

Compl. at P 283. Plaintiff also alleges for the first time in his Objections to the Magistrate's Order that the Beachside members distributed the Beachside newsletter to friends and acquaintances. Judge Boylan's conclusion that the mailing of the newsletter to Beachside residents did not constitute "publicity," and therefore that Plaintiff's proposed amendment was futile as a matter of law, is not clearly erroneous or contrary to law. The distribution of the minutes was not to "the public at large." In addition, Plaintiff's unsupported allegations that Beachside members passed the newsletter on to others does not now give rise to a contrary result.

H. Denial of Punitive Damages Claim

Plaintiff objects to Judge Boylan's ruling that Plaintiff may not assert a claim for punitive damages. Judge Boylan based his determination on Plaintiff's failure to present clear and convincing evidence that any of the Defendants deliberately disregarded his rights, as required by Minn. Stats. §§ 549.191 and 549.20. Plaintiff essentially argues that because Defendants Krietzman [*54] and Felhaber are "experts" in the law with respect to mortgage foreclosures and creditor's rights, this Court should conclude that they had absolute knowledge of the pertinent law and knew that they were collecting attorney's fees in an amount greater than that permitted by law.

The applicability of Minn. Stat. § 582.01 regarding mortgage foreclosures to the lien assessment foreclosure is confusing and uncertain, and therefore it is highly unlikely that Defendants Krietzman and Felhaber were intentionally acting in con-

travention to what they believed § 582.01 mandated. In addition, Judge Boylan correctly concluded that Plaintiff has submitted no evidence that Defendants Krietzman, Felhaber, and Beachside acted in any way that demonstrated a deliberate disregard for Cohen's rights or safety. See Gamma-10 Plastics, Inc. v. American President Lines, Ltd., 32 F.3d 1244, 1254-55 (8th Cir. 1994). Consequently, Judge Boylan's finding with respect to punitive damages is adopted in its entirety.

V. PLAINTIFF'S MOTION FOR LEAVE TO CITE ADDITIONAL AUTHORITY

On October 20, 2005, Cohen filed a Motion for Leave to Cite Additional Authority [Docket [*55] No. 94]. In his Motion, Cohen asks the Court to consider a new case in the District of Massachusetts, which purportedly disagrees with Rosado v. Taylor, 324 F. Supp. 2d 917, 924 (N.D. Ind. 2004) and adopts an expansive interpretation of security enforcement activities as a method of collecting a debt and therefore covered by the FDCPA. Pettway v. Harmon Law Offices, P.C., 2005 U.S. Dist. LEXIS 21341, No. 03-CV-10932, 2005 WL 2365331, at*4-6 (D. Mass. Sept. 27, 2005). Pettway is factually distinguishable from the present case and is not binding authority on this Court.

VI. CONCLUSION

Based upon the foregoing, and all the files, records, and proceedings herein, **IT IS HEREBY ORDERED** that:

1. Plaintiff Cohen's Motion for Partial Summary Judgment [Docket No. 20] is **DENIED.**

2. Plaintiff Cohen's Appeal [Docket No. 83] to Judge Boylan's Order [Docket No. 80] is **DENIED** with the limited exception of Plaintiff's ability to allege emotional distress damages as an element of his libel claim.

3. Plaintiff Cohen's Motion for Leave to Cite Additional Authority [Docket No. 94] is **DENIED.**

BY THE COURT:

s/ Ann D. Montgomery

ANN D. MONTGOMERY

U.S. DISTRICT JUDGE

Dated: [*56] November 17, 2005.

DISTRICT COURT OPINION AND ORDER
6/29/2006

Glenn S. Cohen, Plaintiff, v. Beachside Two-I Homeowners' Association; Fredrick R. Krietzman; Felhaber, Larson, Fenlon & Vogt, A Professional Association; U.S. Bancorp, d/b/a U.S. Bank Home Mortgage, Defendants.

Civil No. 05-706 ADM/JSM

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

2006 U.S. Dist. LEXIS 44978

June 29, 2006, Decided

SUBSEQUENT HISTORY: Affirmed by, Modified by, in part Cohen v. Beachside Two-I Homeowners' Ass'n, 2008 U.S. App. LEXIS 7540 (8th Cir. Minn., Apr. 9, 2008)

PRIOR HISTORY: Cohen v. Beachside Two-I Homeowners' Ass'n, 2005 U.S. Dist. LEXIS 28536 (D. Minn., Nov. 17, 2005)

COUNSEL: [*1] For Beachside Two-I Homeowners' Association, Cross Defendant: Christopher G Angell, Murnane Brandt, PA, St Paul, MN.

For Felhaber, Larson, Fenlon & Vogt, Defendant: Kimberly Fleming, Lind Jensen Sullivan & Peterson, PA, Minneapolis, MN.

For Beachside Two-I Homeowners' Association, Defendant: Thomas A Gilligan, Jr, Murnane Brandt, PA, St Paul, MN.

For U.S. Bancorp, Cross Claimant: Charles N Nauen, Lockridge Grindal Nauen P.L.L.P., Minneapolis, MN.

For Felhaber, Larson, Fenlon & Vogt, Defendant: Paul C Peterson, Lind Jensen Sullivan & Peterson, PA, Minneapolis, MN.

For U.S. Bancorp, Cross Claimant: David J Zoll, Lockridge Grindal Nauen PLLP, Minneapolis, MN.

JUDGES: ANN D. MONTGOMERY, U.S. DISTRICT JUDGE.

OPINION BY: ANN D. MONTGOMERY

OPINION

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

On April 27, 2006, oral argument before the undersigned United States District Judge was heard on the following motions: (1) Defendant Beachside Two-I Homeowners' Association's ("Beachside") Motion for Partial Summary Judgment [Docket No. 157], (2) Defendants Fredrick R. Krietzman ("Krietzman") and Felhaber, Larson, Fenlon & Vogt, P.A.'s ("Felhaber") Motion for Summary

Judgment [*2] [Docket No. 167], and (3) Defendant U.S. Bancorp d/b/a U.S. Bank Home Mortgage's ("U.S. Bank") [1] Motion for Summary Judgment [Docket No. 162]. Also on April 27, 2006, the Court ruled from the bench, denying Plaintiff Glenn S. Cohen's ("Plaintiff" or "Cohen") Motion for Leave to Amend Memorandum of Law in Opposition to Defendant Beachside's Motion for Partial Summary Judgment [Docket No. 222]. On May 1, 2006, Cohen asked the court to reconsider its ruling. Letter to District Judge [Docket No. 227]. For the reasons set forth herein, Defendants' Motions are granted and Plaintiff's request for reconsideration is denied. Additionally, Plaintiff's Motion for Summary Judgment [Docket No. 189] is denied as moot.

II. BACKGROUND [2]

[*3] On January 21, 2004, the Beachside Board of Directors ("Board") held a board meeting. Angell Aff. [Docket No. 160] Ex. K. Board members Sandal Hart, Phyllis Wirkkula, Marilyn Watt, Marci Antolik, and David Martin, and Property Manager Jim Stroebel, attended the meeting. Id. No other homeowners attended. Id. Minutes of the meeting were recorded by Secretary/Treasurer Marilyn Watt

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[1] As noted in the November 17, 2005 Order [Docket No. 107], U.S. Bank National Association, not U.S. Bancorp d/b/a U.S. Bank Home Mortgage, is the proper party defendant to this action.

[2] The November 17, 2005 Order sets forth the facts of this case, and they are incorporated by reference. Additional facts relevant to this Order are set forth in this Background section.

("January 21 Minutes"). Id. The section of the minutes entitled "Old Business" reports:

> One homeowner has not paid dues for nine months-- . [3] Numerous attempts have been made by the attorney to reach the homeowner by mail and telephone, and all attempts have been unsuccessful. Therefore, the Board has elected to proceed with foreclosure of this unit since it is obvious the homeowner is not willing to work out any type of negotiated settlement for the outstanding dues.

Id. The January 21 Minutes were later mailed to all Beachside homeowners by Omega Management, Beachside's management company. Hart Dep. at 49.

[*4] On June 16, 2004, the Beachside Board held another meeting. Angell Aff. Ex. O. Board members Sandal Hart, David Martin, Marilyn Watt, and Beth Hambel, and Property Manager Jim Stroebel attended. Id. No other homeowners were in attendance. Id. The "Treasurer's Report" section of the minutes ("June 16 Minutes") states:

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[3] At her deposition, President Sandal Hart testified that "our board policy is not to publish [in the meeting minutes] the name or the unit numbers of people who are behind [on payments]. The reason for publishing anything about accounts receivables is to give the membership information about the financial status of the association and their money." Angell Aff. Ex. T (Hart Dep.) at 61. As a result, homeowners receive meeting minutes in which names and addresses have been "blanked out." Id. at 50-51.

> Accounts receivables ended May with a balance of $ 6,293 in unpaid assessments, insurance, attorney fees, garage door charges and late fees. The majority of the unpaid monthly assessments is due to one homeowner, and this property has been purchased by US Bancorp. Beachside II-I received a check for payment in full on this delinquency June 1st.

Id.

III. DISCUSSION

A. Standard of Review

Federal Rule of Civil Procedure 56(c) provides that summary judgment shall issue "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); see [*5] Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). On a motion for summary judgment, the Court views the evidence in the light most favorable to the nonmoving party. Ludwig v. Anderson, 54 F.3d 465, 470 (8th Cir. 1995). The nonmoving party may not "rest on mere allegations or denials, but must demonstrate on the record the existence

of specific facts which create a genuine issue for trial." Krenik v. County of Le Sueur, 47 F.3d 953, 957 (8th Cir. 1995).

B. Claims Against Beachside

Beachside moves for summary judgment on Cohen's claims for defamation and negligent infliction of emotional distress. For the reasons stated herein, Beachside's Motion is granted.

1. Cohen's Request for Reconsideration of Motion for Leave to Amend Memorandum of Law in Opposition to Defendant Beachside's Motion for Partial Summary Judgment

As an initial matter, the Court addresses Cohen's Request for Reconsideration of the Court's ruling at oral argument that he may [*6] not amend his Memorandum of Law in Opposition to Beachside's Motion for Partial Summary Judgment. In his thirty-six page Opposition Memorandum [Docket No. 206], filed April 10, 2006 and directed toward Defendants Beachside, Krietzman, and Felhaber, Cohen addressed only approximately one and one half pages of argument to Beachside's Motion. Cohen then wrote: "Plaintiff apologizes for the brevity of this section; he intends to petition the court to allow him to amend his response to have a more complete brief." Id. at 35. Cohen then filed a Motion for Leave to Amend Memorandum of Law in Opposition to Defendant Beachside's Motion for Partial Summary Judgment along with a proposed amended memorandum of law on April 26, 2006, nine days after Beachside filed its Reply Memorandum [Docket No. 215] and one day before oral ar-

gument. In his Motion, Cohen asserts several reasons why he was unable to complete his Opposition Memorandum within the time allowed by the briefing schedule: (1) he filed multiple Motions to Compel and subsequently received over 2,000 pages of documents, (2) he had to respond to three summary judgment motions without the help of administrative support, and (3) he [*7] got married on April 2, 2006 and was on his honeymoon from April 13 to April 22. At oral argument, the Court verbally denied Cohen's Motion.

Cohen now requests reconsideration, stating he did not have time to complete his memorandum because Magistrate Judge Janie S. Mayeron had not yet ruled on his March 7, 2006 Motion [Docket No. 173] requesting additional time to respond to Defendants' Summary Judgment Motions, and he relied on the assumption that he would be given additional time to respond. Cohen argues that Beachside could be given an opportunity to file an amended reply brief, and oral argument on Beachside's Motion could be reargued. Cohen's request for reconsideration is denied. Cohen's workload is largely his own making: Cohen instituted this multi-claim lawsuit, suing four separate Defendants, and Cohen has filed many Motions. Cohen also chose to represent himself rather than hiring counsel. As a result, Cohen can not now be heard to complain that he did not have enough time to complete his memoranda within the standard briefing schedule that is routinely followed in civil cases. Even if the Court were to consider Cohen's full memorandum, the result would not change, as [*8] Cohen fails to state a claim for defamation.

2. Claim for Defamation [4]

Cohen's defamation claim is based on statements made by Secretary/Treasurer Marilyn Watt ("Watt") in the January 21 Minutes and June 16 Minutes (collectively "meeting minutes"). Beachside claims that it is entitled to summary judgment on Cohen's defamation claim because the statements were substantially true, privileged, and there is no evidence of resulting harm to Cohen's reputation. "In order for a statement to be considered defamatory, it must be communicated to someone other than the plaintiff, it must be false, and it must tend to harm the plaintiff's [*9] reputation and to lower him in the estimation of the community." Stuempges v. Parke. Davis & Co., 297 N.W.2d 252, 255 (Minn. 1980).

a. Substantial Truth

Truth and substantial truth are defenses to a defamation claim. Id. at 255. "[T]rue statements, however disparaging, are not actionable." Id. A "plaintiff cannot succeed in meeting the burden of proving falsity by showing only that the statement is not literally true in every detail. If the statement is true in substance, inaccuracies of expression or detail are immaterial." See Jadwin v. Minneapolis Star & Tribune Co., 390 N.W.2d 437, 441 (Minn.

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[4] At oral argument, Cohen asserted for the first time that the statements at issue are defamatory per se, but conceded that he did not plead defamation per se in his Complaint. Beachside did not brief the claim of defamation per se, but even if the statements in question are defamatory per se, Cohen's claims still fail due to the defenses of substantial truth and qualified privilege.

Ct. App. 1986). "A statement is substantially accurate if its gist or sting is true, that is, if it produces the same effect on the mind of the recipient which the precise truth would have produced." Id. Substantial truth is a question of law. Id.

The January 21 Minutes contain three separate allegedly defamatory statements. The first is that: "One homeowner has not paid dues for nine months-- ." Angell Aff. Ex. K. At the time the statement was published, Cohen had not made any payment to Beachside for his monthly [*10] association dues since May 2003, for a total of eight months. Angell Aff. Ex. E. Cohen argues he did not send Beachside monthly checks during that time period because he believed he had a substantial amount of credit on his account at that time--the disputed late fees and legal fees--and therefore he did not owe any money to Beachside. Angell Aff. Ex. H (Cohen Dep.) at 98. Regardless of whether the disputed late fees and legal fees should have been considered as a credit toward his account, Beachside's statement remained substantially true, as Cohen had not sent Beachside a check for monthly association dues in eight months. The fact that the statement referred to nine months instead of eight months is an "immaterial inaccuracy of detail" and does not change the analysis.

The next allegedly defamatory statement is: "Numerous attempts have been made by the attorney to reach the homeowner by mail and telephone, and all attempts have been unsuccessful." Angell Aff. Ex. K. Beachside avers that Krietzman, its attorney, first contacted Cohen by letter dated September 11, 2003. Angell Aff. Ex. I. Cohen then re-

sponded by letter, dated October 18, 2003, advising Krietzman not to contact him [*11] again, and that he disputed the amount alleged to be owed. Angell Aff. Ex. J. Cohen also made a settlement offer, stating that if Beachside would bring his account balance down to zero, he would begin making regular monthly payments again. Id. In his deposition, Cohen stated that he "kept getting the calls and letters from Mr. Krietzman," that "there were a number of voice mails" and "a number of notices sent." Cohen Dep. at 143-44. The only discussion Cohen testified he remembers having with Krietzman prior to January 2004 is a phone conversation on November 20, 2003. Id. at 144. During the conversation, Krietzman told Cohen that Beachside might be willing to waive the late fees, and Cohen again suggested Beachside return his account to a zero balance. Id. at 149.

Based on the undisputed facts, the second allegedly defamatory statement is also substantially true. The first part of the statement, "numerous attempts have been made by the attorney to reach the homeowner by mail and telephone," is true. Cohen himself states that he received a number of voice mails and notices from Krietzman, yet he only responded by letter once and only spoke on the phone with Krietzman once. [*12] The second half of the statement, "and all attempts have been unsuccessful," is a closer question. It is not true literally, as Krietzman was able to "reach" Cohen twice, once by letter and once by phone. However, the vast majority of Krietzman's attempts did not result in contact with Cohen, and in the two that did, Cohen did not agree to pay the amount that Beachside

claimed he owed. When the entire statement is considered in context, it is substantially true.

The third allegedly defamatory statement in the January 21 Minutes is: "Therefore, the Board has elected to proceed with foreclosure of this unit since it is obvious the homeowner is not willing to work out any type of negotiated settlement for the outstanding dues." Angell Aff. Ex. K. The first part of this sentence, "the Board has elected to proceed with foreclosure of this unit," is undisputedly true. See Cohen Dep. at 101-02. Cohen alleges that the second part of the sentence, "since it is obvious the homeowner is not willing to work out any type of negotiated settlement for the outstanding dues," is not true because he was willing to settle the dispute. Cohen Dep. at 103-06. Cohen states that he told Krietzman in [*13] his letter and on the phone that he was willing to resume paying monthly assessments if his Beachside account balance was brought to zero. Cohen's position was that if all the late fees and legal fees he had previously paid "under protest" were attributed to his account balance for unpaid monthly association fees, the two would essentially cancel one another out and his account balance would be current. Beachside's position was that Cohen owed the previous late fees and legal fees as well as the unpaid monthly association dues, and therefore crediting him for the fees would not return his account balance to zero. Therefore, although Cohen had made a "settlement offer," Beachside was not willing to accept his offer, and there is no evidence that Cohen was willing to negotiate a settlement that included any payment for

dues as well as fees. Id. As a result, Beachside's statement is substantially true.

The June 16 Minutes contain two allegedly defamatory statements. Angell Aff. Ex. O. The first is: "The majority of the unpaid monthly assessments is due to one homeowner, and this property has been purchased by US Bancorp." Id. In his deposition, Cohen testified that he does not [*14] know whether the first half of the sentence is true or not, since he does not know what other homeowners owed. Cohen Dep. at 107. He also testified that he believed the statement referred to him because he allegedly owed Beachside a large sum of money and $ 5,920.08 had just been removed from his escrow account. Id. The minutes state that accounts receivable totaled $ 6,293, and $ 5,920.08 is certainly the majority of $ 6,293. See Angell Aff. Ex. O. As a result, the first part of the statement is true.

Cohen contests the second half of the sentence because his property was not actually purchased by U.S. Bank. Cohen Dep. at 108-09. Cohen contends that U.S. Bank sent Beachside a check drawn from Cohen's tax escrow account to satisfy the lien against Cohen's property. Id. At her deposition, Sandal Hart testified that when Omega Management notified the Beachside Board that U.S. Bank had sent a check to "clear the entire accounts receivables from [Cohen's] account," the Board incorrectly assumed that U.S. Bank had purchased Cohen's home. Hart Dep. at 59. The Board's mistaken assumption does not render their statement substantially true. Satisfying a lien amount of $ 5,000 [*15] is different from purchasing property likely worth considerably more than that. As a re-

sult, substantial truth is not a defense to the statement that "this property has been purchased by US Bancorp."

The second allegedly defamatory sentence is: "Beachside II-I received a check for payment in full on this delinquency June 1st." Angell Aff. Ex. O. Cohen argues that this sentence is not true because the check was sent by U.S. Bank on either May 14 or May 17, 2004. Cohen Dep. at 111. While Cohen speculates that Beachside must have received the check from U.S. Bank prior to June 1, Cohen has set forth no evidence to support his contention. The substance of the statement--that Beachside received a check from U.S. Bank covering the full amount of debt allegedly owed--is true. The possibly incorrect date of June 1 is the type of inaccurate detail that is immaterial. As a result, the second allegedly defamatory sentence in the June 16 Minutes is substantially true and is not defamatory.

b. Qualified Privilege

Qualified privilege is a defense to a defamation claim unless the privilege is abused. Stuempges, 297 N.W.2d at 256-57.

> The law is that a communication, [*16] to be privileged, must be made upon a proper occasion, from a proper motive, and must be based upon reasonable or probable cause. When so made in good faith, the law does not imply malice from the communication itself, as in the ordinary case of libel. Actual malice must be proved, before there can be a re-

> covery, and in the absence of such proof the plaintiff can not recover.

Id. The Minnesota Supreme Court has said:

> The doctrine of privileged communication rests upon public policy considerations. As other jurisdictions recognize, the existence of a privilege results from the court's determination that statements made in particular contexts or on certain occasions should be encouraged despite the risk that the statements might be defamatory. Whether an occasion is a proper one upon which to recognize a privilege is a question of law for the court to determine.

Lewis v. Equitable Life Assurance Soc'y of the United States, 389 N.W.2d 876, 889 (Minn. 1986).

Beachside argues that it is also entitled to summary judgment on Cohen's defamation claim because the statements were subject to qualified privilege and Cohen can not overcome the privilege [*17] by establishing actual malice. Beachside argues that the statements were privileged because their publication was (1) limited to persons have a common interest in Beachside's financial well-being and (2) based on reasonable grounds. Beachside relies on the Restatement (Second) of Torts § 596, which states: "An occasion is conditionally privileged when the circumstances are such as to lead any one of several persons having a common interest in a particular subject matter correctly or reasonably to believe that facts exist which another

sharing such common interest is entitled to know." Beachside avers that Minnesota courts have recognized the "common interest" qualified privilege. See Patmont v. Int'l Christian Missionary, 142 Minn. 147, 171 N.W. 302, 302 (Minn. 1919). Beachside concedes that there are no Minnesota cases dealing with the applicability of the common interest qualified privilege in the context of a common interest homeowners' association, but relies on a New York case. See Erdberg v. Freeman, 90 Misc. 2d 797, 396 N.Y.S.2d 315 (N.Y. Civ. Ct. 1977). In Erdberg, the court recognized a common interest qualified privilege for members [*18] of a tenants association, stating:

> It is apparent that the tenants and landlord of an apartment building constitute a group with a common interest in its security and quality as a residence. Communication among members of such a group for the purpose of advancing that interest, made in good faith and published only to properly interested persons are protected from the hazards of an action for defamation by a qualified privilege.

Id. at 316.

Beachside is entitled to a common interest qualified privilege regarding its communications in the Board meeting minutes. The Beachside Board, management company, and homeowners share a common interest in their town home community. Members pay monthly assessments, which contrib-

ute to supporting the town home community. The failure of some homeowners to pay their monthly assessments directly impacts the entire Beachside community. As a result, the Beachside homeowners have a general right to be kept informed by the Board of the financial status of their community.

The statements in the Board meeting minutes entirely relate to the financial status of the community. The Board limited the personal impact of the statements [*19] on Cohen by redacting personal identifying information, thereby ensuring that the community was generally informed when monthly assessments were not paid, without being aware of the identity of the homeowners in arrears. Only the Beachside Board and the management company knew that the statements referred to Cohen, and those individuals needed to know of Cohen's identity, as it was their responsibility to resolve any alleged delinquencies with homeowners. The Board also had reasonable grounds to believe that the statements were true, as the Board was relying on financial information provided to it by its management company. See Hart Dep. at 33, 44-46, 51, 59, 63; Rudebeck v. Paulson, 612 N.W.2d 450, 454 (Minn. Ct. App. 2000) ("Reasonable grounds can exist if a person has valid reasons for believing a statement, even though the statement later proves to be false.").

Once a defendant has established the existence of a qualified privilege, the plaintiff must prove actual malice to recover. Rudebeck, 612 N.W.2d at 454. To prove malice, a plaintiff must show that the defendant "made the statement from ill will and improper motives, or causelessly and [*20] wan-

tonly for the purpose of injuring the plaintiff." Stuempges, 297 N.W.2d at 257. "Although malice is generally a question of fact, summary judgment is appropriate if the plaintiff fails to raise a genuine issue of material fact regarding malice." Kuelbs v. Williams, 609 N.W.2d 10, 16 (Minn. Ct. App. 2000). "When the only evidence presented of actual malice is that it was an alternative reason for the defendant's action, and there is 'direct evidence' that probable cause existed for the action taken, no jury question exists with respect to actual malice." El Deeb v. Univ. of Minn., 60 F.3d 423, 427 (8th Cir. 1995) (citations omitted).

Cohen argues that statements by Marilyn Watt show her malicious vendetta toward him, and negate any privilege that may have applied. Cohen offers an email from Watt to former Property Manager Jim Stroebel, in which Watt calls Cohen a "nerd," as evidence of Watt's malicious vendetta:

> Have I told you lately that I think Glen Cohen is a nerd??!!!!! I'm thinking the settlement should be that he needs to keep current or we will file a lien on his property!! Or anything else we can get away with! [*21] !! Since we know he's not going to have to pay the late charges, he'll just let the dues ride again, I'm sure. Makes me so mad when these homeowners hold things over our heads!!

Cohen Aff. [Docket No. 207] Ex. O at H00670. Cohen has failed to create a genuine issue of mate-

rial fact with respect to malice. While Cohen has offered some evidence that Watt had ill will toward Cohen, Cohen has offered no evidence that Watt's ill will motivated her to write the alleged defamatory statements in the Board meeting minutes. More importantly, as discussed above, Beachside has proffered "direct evidence" that probable cause existed for Watt's statements in the meeting minutes. The Board had a duty to keep the Beachside homeowners informed as to the financial status of the Beachside community. The Beachside Board had reason to believe that Cohen was behind in his monthly assessment payments based on information received from Beachside's management company. The Board informed the homeowners of the alleged delinquency in the meeting minutes, but only after removing identifying information as to the delinquent homeowner. Cohen's evidence of actual malice is merely an alternative reason for [*22] the alleged defamatory statements in the meeting minutes. Because Beachside has provided direct evidence that probable cause existed for the statements contained in the meeting minutes, Cohen has failed to establish actual malice or negate the existence of a qualified privilege.

In his Opposition Memorandum, Cohen argues that summary judgment is premature because he has Motions to Compel outstanding and thus discovery has not been completed. Beachside opposes Cohen's position, stating that the discovery period established in the Amended Pretrial Scheduling Order [Docket No. 153] has expired, and that Beachside provided Cohen approximately 500 documents in response to Cohen's discovery request. As

discussed below with respect to Cohen's similar request regarding Krietzman and Felhaber's Motion for Summary Judgment, the parties have had more than enough time to conduct discovery in this matter, and accordingly, summary judgment is now appropriate.

c. Harm to Reputation

Beachside argues that regardless of whether the statements at issue were true or privileged, Cohen has failed to come forward with any evidence of resulting harm to his reputation. To establish a claim of defamation, [*23] the plaintiff must prove that the statements tended to harm his reputation or lower him in the estimation of the community. See, e.g., Stuempges, 297 N.W.2d at 255. Cohen's claim must fail as a matter of law if he has presented no evidence of harm to his reputation. See Combs v. R.R. Donnelley & Sons Co., 97 Fed. Appx. 685, 687 (8th Cir. 2004); Bauer v. Ford Motor Credit Co., 140 F. Supp. 2d 1019, 1023 (D. Minn. 2001), vacated in part by 149 F. Supp. 2d 1106 (D. Minn. 2001).

Cohen's defamation claim fails because he has provided no evidence that any of the statements in the meeting minutes harmed his reputation or lowered him in the estimation of the community. In his deposition, Cohen agreed that other than Beachside Board members and employees of the management company, he was not aware of anyone that received the meeting minutes that knew that the minutes referred to Cohen, since Cohen's name was "blanked out" of all copies of the meeting minutes that were sent to homeowners. Cohen Dep. at 97-98, 109-10. Cohen further admitted that he is unable to identify any individual that is not a member

of the Beachside Board [*24] or is not an employee of the management company that now thinks less of him because of the statements. Id. at 115-17. Cohen further admitted that he has no evidence that any Beachside Board members or any members of Omega Management Company changed their opinion of him or thought less of him after reading the meeting minutes. Id. at 174-76.

After his deposition, Cohen submitted second supplemental answers to Beachside's Interrogatories. Angell Aff. Ex. V. In his answer to interrogatory 16, Cohen identified James Stroebel, Brandi Wyatt, and Joni Timm as people who have "negative views of Plaintiff after the publishing of the defamatory statements." Id. at 17. Other than Cohen's conclusory statement, there is no evidence in the record as to how those three individuals view Cohen, or how their views of Cohen may have changed because of the meeting minutes. Even if the Court accepts that these three individuals have a negative view of Cohen after the meeting minutes were published, Cohen has failed to present any evidence that these individuals view him in a different light as a direct result of the meeting minutes. In addition, at oral argument, Cohen stated that he had [*25] no evidence of harm to his reputation. For all the foregoing reasons, Cohen's defamation claim fails and summary judgment is appropriate.

3. Claim for Negligent Infliction of Emotional Distress

In the November 17, 2005 Order, the Court stated that although Cohen had not asserted that

he was ever placed in any sort of physical danger by Beachside or suffered any type of physical harm, he may have a derivative claim for emotional distress damages if he is able to prove an underlying direct invasion of his rights by libel. Order at 30; see also Lickteig v. Alderson, Ondov, Leonard & Sweeten, 556 N.W.2d 557, 560 (Minn. 1996). Because Cohen's defamation claim fails as a matter of law, his derivative negligent infliction of emotional distress claim must fail as well. See Covey v. Detroit Lakes Printing Co., A Div. of Forum Publ'g Co., 490 N.W.2d 138, 144 (Minn. Ct. App. 1992) ("A negligent infliction of emotional distress claim based on the same facts as a failed defamation claim cannot survive."). As a result, Beachside's Motion for Partial Summary Judgment on Cohen's claims for defamation and negligent infliction of emotional distress is granted.

[*26] C. Claims Against Krietzman and Felhaber

In his Complaint, Cohen alleges that Krietzman and Felhaber violated four sections of the Fair Debt Collection Practices Act ("FDCPA"): 15 U.S.C. §§ 1692c(c), 1692e(5), 1692e(11), and 1692f(1). Cohen alleges that the Notice of Pendency to Foreclose Lien and Power of Attorney to Foreclose Lien ("Notice") filed by Krietzman violated the FDCPA because it did not contain a required disclosure notice, was a threat to take a foreclosure action that can not legally be taken, and was an attempt to collect an amount that is not expressly authorized by the agreement creating the debt or permitted by law. Cohen alleges that Krietzman's April 13, 2004

letter ("April 13 letter"), April 13, 2004 voice mail, [5] and June 8, 2004 letter ("June 8 letter") violated the FDCPA because Cohen had previously demanded that Krietzman cease all communication. Cohen further alleges that the April 13 letter was a threat to take a foreclosure action that can not be legally taken. Finally, Cohen alleges that Krietzman collected $ 5,920.08 from Cohen's tax escrow account [*27] with U.S. Bank, an amount greatly in excess of any amount expressly authorized by the agreement creating the alleged debt or permitted by law.

1. Threshold Matters: Statute of Limitations and Status of Foreclosure Activities

As an initial matter, Krietzman and Felhaber assert that pursuant to the FDCPA statute of limitations, they are not liable for any actions taken prior to April 7, 2004. 15 U.S.C. § 1692k(d) states: "An action to enforce any liability created by this subchapter may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other [*28] court of competent jurisdiction, within one year from the date on which the violation occurs." With respect to letters, the statute of limitations begins to run the date the letter is mailed. Mattson v. U.S. West

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[5] In his Opposition Memorandum, Cohen admits that while he initially believed the voice mail in question was left on April 13, 2004, he later discovered that the voice mail was left on March 22, 2004, which is outside the statute of limitations for Cohen's FDCPA claim. Opp'n Mem. at 22-23. Consequently, Cohen withdraws his FDCPA claim with respect to Krietzman's voice mail. Id.

Communications, Inc., 967 F.2d 259, 261 (8th Cir. 1992). Cohen filed his Complaint on April 7, 2005. As a result, any FDCPA claims based on actions committed by Krietzman and Felhaber prior to April 7, 2004 are barred by the statute of limitations.

Another threshold matter concerns whether Krietzman and Felhaber's actions constitute foreclosure activities and not debt collection activities subject to the FDCPA. Krietzman and Felhaber cite district court cases from other jurisdictions to support their position that foreclosure activities are not debt collection within the meaning of the FDCPA. See Beadle v. Haughey, 2005 U.S. Dist. LEXIS 2473, No. Civ. 04-272-SM, 2005 WL 300060, at *3-4 (D.N.H. Feb. 9, 2005); Rosado v. Taylor, 324 F. Supp. 2d 917, 924-25 (N.D. Ind. 2004); Sweet v. Wachovia Bank & Trust Co., N.A., 2004 U.S. Dist. LEXIS 29862, No. Civ. A. 3:03-CV-1212-R, 2004 WL 1238180, at *2 (N.D. Tex. Feb. 26, 2004); Hulse v. Ocwen Fed. Bank, FSB, 195 F. Supp. 2d 1188, 1204 (D. Or. 2002); [*29] Heinemann v. Jim Walter Homes, Inc., 47 F. Supp. 2d 716, 722 (N.D.W. Va. 1998). Cohen cites circuit court cases from other circuits to support his position that foreclosure is a debt collection activity subject to the FDCPA. See Wilson v. Draper & Goldberg, P.L.L.C., 443 F.3d 373, 376-77 (4th Cir. 2006); Piper v. Portnoff Law Assocs., Ltd., 396 F.3d 227, 234 (3d Cir. 2005); In re Martinez, 311 F.3d 1272 (11th Cir. 2002); Romea v. Heiberger & Assocs., 163 F.3d 111, 115-16 (2d Cir. 1998). This issue has apparently not yet been decided by the Eighth Circuit. The Court finds it unnecessary to reach this question of law because,

even assuming that lien foreclosure constitutes debt collection under the FDCPA, Cohen's FDCPA claims fail.

2. Notice of Pendency to Foreclose Lien and Power of Attorney to Foreclose

A. 15 U.S.C. § 1692e(11)

Cohen first alleges that the Notice filed by Krietzman with the Office of the Registrar of Titles in Hennepin County ("Registrar") on April 12, 2004 violates § 1692e(11) of the FDCPA because it did not contain certain required disclosures. [*30] Cohen Aff. Ex. G. Krietzman and Felhaber argue that the Notice does not violate the disclosure section of the FDCPA because Cohen did not receive the Notice from Felhaber but rather obtained copies of the Notice from the Registrar. Therefore, the Notice is not "communications with a consumer" or an attempt to collect a debt. Krietzman and Felhaber also argue that the filing of documents does not trigger the FDCPA. Cohen responds that due to the FDCPA's broad definition of "communication," the Notice conveys information about the debt to the public, and the FDCPA disclosures should have been included. Also, the Notice is not the filing of a lawsuit, and therefore the exception for formal pleadings contained within § 1692e(11) does not apply.

15 U.S.C. § 1692e, directed toward preventing debt collectors from using false, deceptive, or misleading representations in connection with collecting a debt, prohibits:

> The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt [*31] and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.

15 U.S.C. § 1692e(11). "Communication" is defined as "the conveying of information regarding a debt directly or indirectly to any person through any medium." 15 U.S.C. § 1692a(2). "Consumer" is defined as "any natural person obligated or allegedly obligated to pay any debt., 15 U.S.C. § 1692a(3).

Section 1692e(11) concerns communications with consumers that allegedly owe a debt, and attempts to ensure that those communications clearly convey that they are from a debt collector and are an attempt to collect a debt. In this case, the Notice was not sent to the alleged debtor and was not created to attempt to collect the alleged debt owed. Rather, the Notice was a document that Krietzman was required to file with the Registrar as a part of a foreclosure by advertisement proceeding. See Minn. Stat. §§ 580.032 , subd. 3; [*32] 580.05. While the Notice does have the tangential affect of conveying information regarding the debt to any

member of the public that reads the Notice, it is not the type of communication that Congress sought to bar within the scope of § 1692e(11). In addition, while the phrase "with the consumer" does not appear directly after "subsequent communications" in the latter half of the statute, the appearance of that phrase directly after "initial communication" in the first part of the statute suggests that § 1692e(11) is designed to ensure that communications with the consumer include the required disclosures. Because the Notice was not a communication with a consumer that attempted to collect a debt but rather a required administrative filing in connection with a foreclosure proceeding, the Notice does not violate § 1692e(11).

b. 15 U.S.C. § 1692e(5)

Cohen alleges that the Notice also violates § 1692e(5) of the FDCPA because it is a threat to take a foreclosure action that can not be legally taken. Krietzman and Felhaber argue that the Notice does not violate § 1692e(5) because it does not "threaten" to take legal action; it is, in [*33] and of itself, an "action." Also, Krietzman and Felhaber did not threaten to take an action that they did not intend to take. Their actions in proceeding with the foreclosure demonstrate that they intended and did pursue foreclosure. Krietzman and Felhaber further argue that they did not threaten to take an action that could not be legally taken because Beachside's governing documents authorized the foreclosure process. Additionally, even if Krietzman and Felhaber charged attorney's fees greater than the amount allowed by Minn. Stat. § 582.01, and the

excess amount is void, it does not make the entire foreclosure illegal.

Cohen responds that the Notice violated § 1692e(5) because it threatened to collect attorney's fees greater than the amount allowed by Minn. Stat. § 582.01, and threatened to collect late fees that were not authorized by the Beachside governing documents. Cohen further argues that the foreclosure documents are void because the Beachside Board members who voted in favor of foreclosure and signed the foreclosure documents were not elected to the Board in accordance with the procedures set forth by the governing documents.

[*34] 15 U.S.C. § 1692e(5) prohibits "[t]he threat to take any action that cannot legally be taken or that is not intended to be taken." "Whether a document is threatening in nature is determined by whether it is informational, whether it contains an outright threat and how the least sophisticated debtor would construe it." Campion v. Credit Bureau Services, Inc., 2000 U.S. Dist. LEXIS 20233, . CS-99-0199-EFS, 2000 WL 33255504, at *9 (E.D. Wash. Sept. 20, 2000), citing Wade v. Regional Credit Ass'n, 87 F.3d 1098, 1100 (9th Cir. 1996).

In this case, the Notice does not constitute a threat. The Notice is informational in character, setting forth information about the lien and the pending foreclosure by advertisement. The Notice does not contain a threat. The unsophisticated debtor would not construe the Notice as a "threat" but rather as a document providing information about a foreclosure proceeding that was in progress. Freyermuth v. Credit Bureau Servs., Inc.,

248 F.3d 767, 771 (8th Cir. 2001) ("A court evaluating debt collection letters must view them through the eyes of the unsophisticated consumer."). Furthermore, as stated above, [*35] the Notice is simply a document that Krietzman was required to file with the Registrar as part of the foreclosure process. It was not sent to Cohen and did not "threaten" to do anything. As a result, the Notice, even if it (1) included an amount of attorney's fees not permitted by Minn. Stat. § 582.01, (2) included late fees not authorized by Beachside's governing documents, or (3) was signed and approved by Beachside Board members that were not elected in accordance with the procedures set forth in the governing documents, it did not constitute a "threat" and therefore did not violate 15 U.S.C. § 1692e(5).

c. 15 U.S.C. § 1692f(1)

Cohen also alleges that the Notice violates § 1692f(1) of the FDCPA because it is the collection of an amount that is not expressly authorized by the agreement creating the debt or permitted by law. Cohen alleges that the Notice is an attempt to collect an amount of attorney's fees in excess of the amount permitted by Minn. Stat. § 582.01, and an attempt to collect late fees that are not authorized by Beachside's governing documents. Krietzman and [*36] Felhaber argue that Beachside's governing documents specifically provide for the inclusion of costs, expenses, interest, reasonable attorney's fees, and assessments in a lien foreclosure. They also argue that even if they did charge an amount in attorney's fees greater than the amount permitted by Minn. Stat. § 582.01, only the excess amount of fees is negated and the foreclosure itself is not

rendered illegal. Further, whether or not the late fees charged by Beachside were authorized is irrelevant because the lien amount did not include any late fees.

15 U.S.C. § 1692f prohibits a debt collector from using unfair or unconscionable means to collect or attempt to collect a debt, and specifically prohibits: "The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law." 15 U.S.C. § 1692f(1). Upon purchasing his town home, Cohen became bound by Beachside's Declaration and Bylaws ("the governing documents"). The governing documents provide for the collection [*37] of assessments, "together with interest, costs, and reasonable attorney's fees," which constitute a lien against the property. Cohen Aff. Exs. A at Art. IV, § 1; B at Art. 11, § 1. The governing documents further provide that each owner consents to the foreclosure of the lien, if the assessments are not paid within thirty days after the due. date. Cohen Aff. Exs. A at Art. IV, § 1;B at Art. 11, § 1. The Notice does not violate 15 U.S.C. § 1692f(1) because the Beachside governing documents, which constitute the agreement creating the debt, expressly authorize the collection of reasonable attorney's fees. The governing documents do not set forth a specific amount of fees to be collected because of the difficulty of determining in advance the legal effort each situation involving assessment collection and foreclosure will requirer As a result, the governing documents provide for the collection of "reasonable" attorney's fees, and there is no evi-

dence that the amount charged by Krietzman in this case is not reasonable. [6]

[*38] Cohen's argument regarding the Association's collection of late fees is also unavailing. In his affidavit, Krietzman sets forth a chart to show how the lien amount was calculated. Krietzman Aff. at 4-6. Krietzman avers that the lien amount did not include any component for interest or late fees. Id. Indeed, the chart shows that attorney's fees, assessments, and costs were included in the lien amount, but not late fees. Cohen argues that Krietzman's chart of the lien amount is "nothing more than tricky drafting," because if the previously charged disputed late fees were to be considered and credited against his account, Cohen would not have had a negative balance in his account for unpaid assessments from May to August of 2003. While Cohen disputes the late fees that were charged, whether or not the late fees were authorized is a separate issue. Regardless of whether Cohen feels he was charged unauthorized late fees, the undisputed fact remains that he did not pay monthly assessments for several months. Beachside recorded the unpaid monthly assessments, and those amounts were included in the lien amount. While Cohen can dispute whether the late fees

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[6] Cohen argues that the amount collected exceeds the maximum permitted by Minn. Stat. § 582.01, and therefore is the collection of an amount not permitted by law. Assuming *arguendo* that Krietzman and Felhaber violated Minn. Stat. § 582.01, they did not violate 15 U.S.C. § 1692f(1) because they satisfied the statute's alternative requirement, that the amount collected is expressly authorized by the agreement creating the debt.

were authorized, he can not [*39] dispute that they were not included in the lien amount because the evidence shows otherwise. [7] As a result, whether or not Beachside had the authority to charge late fees is irrelevant to whether the Notice violates § 1692f(1) of the FDCPA, and as stated above, Krietzman and Felhaber did not violate § 1692f(1).

[*40] **3. April 13 Letter**

a. 15 U.S.C. § 1692c(c)

Cohen next alleges that Krietzman's April 13 letter violates 15 U.S.C. § 1692c(c) because Cohen had previously demanded in his October 18, 2003 letter ("October 18 letter") that Krietzman cease communication with him. Cohen Aff. Exs. J, M.

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[7] Krietzman's Affidavit shows that $ 100 of the $ 5,920.08 lien amount was collected for partial unpaid assessments for May 2003. Krietzman Aff. at 4. Cohen and Beachside's account statements leave some doubt as to whether the $ 100 was truly for unpaid assessments, or if it was for unpaid late fees and costs. Cohen Aff. Ex. D; Angell Aff. Ex. F. Doubt about this amount does not change the analysis with respect to § 1692f(1). Although the Minnesota Common Interest Ownership Act ("MCIOA") does not apply to Beachside, it does permit homeowners' associations to impose charges for late payment of assessments. Minn. Stat. §§ 515B. 1-102(b)(3); 515B.3-102(a)(11). Also, while the governing documents do not expressly allow for late fees of $ 10 and $ 20, they do allow for the collection of interest, costs, and reasonable attorney's fees. Cohen Aff. Exs. A at Art. IV, § 1; B at Art. 11, § 1. The governing documents expressly state that assessments past due by more than thirty days bear interest from the due date at the rate of 6% per annum. Cohen Aff. Exs. A at Art. IV, § 10; B at Art. 11, § 1. In consideration of the foregoing, as well as the purposes of the FDCPA, Krietzman and Felhaber have not violated § 1692f(1). See 15 U.S.C. § 1692(e).

Krietzman and Felhaber argue that the October 18 letter did not constitute a request to cease communications because it invited contact, and only advised that collection activity must stop. Further, Cohen's previous requests for cessation of contact were directed to the Association, not to Felhaber and Krietzman. In addition, the letter fits within a statutory exception because it notified Cohen that the debt collector intended to invoke a specific remedy. Cohen responds that a fair reading of his October 18 letter as a whole evinces a request not to be contacted by Krietzman and Felhaber again. Cohen also argues that the April 13 letter does not fit within a statutory exception because the letter was written in part to return a check to Cohen, which Cohen alleges was an attempt to collect a debt.

1692c(c) states:

> If a consumer notifies [*41] a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector shall not communicate further with the consumer with respect to such debt, except--
>
> (1) to advise the consumer that the debt collector's further efforts are being terminated;
>
> (2) to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily

> invoked by such debt collector or creditor; or
>
> (3) where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy.
>
> If such notice from the consumer is made by mail, notification shall be complete upon receipt.

On September 11, 2003, Krietzman wrote to Cohen for the first time regarding Cohen's debt to Beachside. Cohen Aff. Ex. L. Cohen responded on October 18, 2003, and a fair reading of Cohen's letter reveals that Cohen disputed the alleged debt owed and no longer wished to be contacted regarding the debt. Cohen Aff. Ex. J. In his letter, Cohen informs Krietzman that: "On multiple occasions I have contacted the Homeowners' Association management and its attorneys [*42] and advised them that I dispute the amount alleged to be owed and that they should no longer contact me or send me any collection notices about the alleged debt." Id. While the prior warnings given to the Association are not imputed to Krietzman, Cohen's October 18 letter puts Krietzman on notice that he no longer wishes to be contacted regarding the debt. See Micare v. Foster & Garbus, 132 F. Supp. 2d 77, 81 (N.D.N.Y. 2001) (holding debt collector does not violate § 1692c(c) upon contacting debtor when debtor previously notified creditor rather than debt collector to cease communication).

Cohen also states in his letter: "I am further advising you that collection activity must stop. . . ." Cohen Aff. Ex. J. Even given that Cohen used the words "collection activity" rather than "communication," and Krietzman and Felhaber did not have to cease collection activity pursuant to the FDCPA, Cohen's pronouncement did put Krietzman and Felhaber on notice that he disputes the debt and no longer wishes to be contacted about it. See Lewis v. ACB Bus. Servs., Inc., 135 F.3d 389, 395 n.2 (6th Cir. 1998) (stating that while the FDCPA provides a mechanism for [*43] the consumer to request that the debt collector cease communication, the FDCPA does not require the debt collector to cease collection efforts). Cohen concludes his letter: "I would be willing to settle this matter if the Association brings my account back down to a zero balance. I would then begin regular monthly payments of $ 153 each month beginning November 1, 2003. I will keep this offer open through October 31, 2003." Cohen Aff. Ex. J. Cohen's "settlement offer" invites further contact, as Krietzman and Felhaber must be able to contact Cohen to discuss the viability of the settlement offer. See Shrestha v. State Credit Adjustment Bureau, Inc., 117 F. Supp. 2d 142, 146 (D. Conn. 2000). As a result, while Cohen's October 18 letter does inform Krietzman and Felhaber that Cohen wishes to have no further communication with respect to the debt generally, it does not ban any future communication. Cohen solicits Krietzman and Felhaber to communicate with him regarding settlement of the debt.

Additionally, Krietzman and Felhaber may continue communicating with Cohen if their communi-

cation falls within one of the FDCPA's statutory exceptions. Krietzman's April 13 letter [*44] returns a check from Cohen to Beachside in the amount of $ 459 "because the Association will no longer accept partial payment of the debt owed by you to the Association." Cohen Aff. Ex. M. The letter further states: "As I have made you aware, the association is proceeding in the foreclosure of its lien against your townhome unit . . . ." Id. Krietzman's April 13 letter does not violate the FDCPA for two reasons. First, Cohen's check for $ 459 can be viewed as a settlement offer of partial payment for the debt he allegedly owed. Beachside "rejected" his settlement offer, as it was not willing to accept partial payment. Krietzman communicated that rejection to Cohen and returned the check. Even if the check was not a "settlement offer," Beachside's refusal to accept the check made it necessary for Krietzman to return the check and communicate to Cohen why the check was being returned. The letter was not otherwise an attempt to collect a debt, and does not violate the FDCPA. In addition, the letter falls within the third statutory exception to 15 U.S.C. § 1692c(c) because Krietzman was further notifying Cohen of Beachside's intent to invoke a specified remedy, [*45] namely, foreclosure.

b. 15 U.S.C. § 1692e(5)

Cohen also alleges that the April 13 letter violates § 1692e(5) as a threat to take a foreclosure action that can not legally be taken, for the same reasons that Cohen alleges the Notice is a threat to take a foreclosure action that can not legally be taken. Cohen's claim fails, for the same reason that it failed with respect to the Notice: the April 13 let-

ter is not a "threat" within the meaning of the FDCPA. See Campion, 2000 U.S. Dist. LEXIS 20233, 2000 WL 33255504, at *9, citing Wade, 87 F.3d at 1100. The letter does not "threaten" to take foreclosure action. Rather, Cohen's check is returned to him to signify Beachside rejected partial payment for the alleged debt, and the letter informs Cohen that Beachside is proceeding with foreclosure. The "unsophisticated debtor" would not construe Krietzman's letter as a threat to take foreclosure action in the future if Cohen did not pay the alleged debt, but rather informs Cohen that the foreclosure process is already underway.

4. June 8 Letter

Cohen next alleges that Krietzman's June 8 letter violates 15 U.S.C. § 1692c(c) [*46] because Cohen had previously demanded that Krietzman and Felhaber cease all communication. As stated above with respect to Krietzman's April 13 letter, Krietzman's letter does not violate the FDCPA if it concerns settlement of the alleged debt or falls within one of the statutory exceptions. Krietzman and Felhaber argue that the June 8 letter falls within the first exception to § 1692c(c) because it constituted notice to Cohen that Krietzman and Felhaber were terminating their collection efforts. Cohen responds that the letter violates § 1692c(c) because there is an "insidious element" to it that caused Cohen to have a "visceral response."

The June 8 letter provided Cohen with a copy of the Satisfaction and Release of Lien that Beachside recorded against Cohen's town home, and states that "[s]ince the Association's lien against the Unit

has been paid through May 14, 2004, the Association has stopped the foreclosure of that lien." Cohen Aff. Ex. N. Regardless of Cohen's reaction to the letter and whether or not Cohen disputed the alleged debt owed, the letter does not violate the FDCPA because it falls squarely within the statutory exception for "advis[ing] the consumer that [*47] the debt collector's further efforts are being terminated." 15 U.S.C. § 1692c(c)(1); see also Order at 28.

5. Check from U.S. Bank

Cohen alleges that Krietzman violated 15 U.S.C. § 1692f(1) by receiving the $ 5,920.08 check in satisfaction of the lien amount from U.S. Bank because it was an amount greatly in excess of any amount expressly authorized by the agreement creating the alleged debt or permitted by law. The same arguments made with respect to Krietzman and Felhaber's alleged § 1692f(1) violation concerning the Notice are reiterated here.

Cohen moved for summary judgment on this same claim in his earlier Motion for Partial Summary Judgment [Docket No. 20]. The Court addressed the viability of this claim in its previous Order. Footnote five noted: "The parties focus their arguments on the 'permitted by law' prong of the unfair practices test, rather than the 'authorized by the agreement' prong. Although the governing documents mention the collection of reasonable attorney's fees, they do not state a specific amount, here the $ 5,920.08 charged." Order at 10 n.5. In light of the arguments proffered by both parties [*48] at the time, the Court opined the amount of

attorney's fees collected may have been greater than the maximum amount allowed by Minn. Stat. § 582.01, and therefore may not have been "permitted by law." Order at 12-14. The Court found summary judgment was not appropriate for this claim on the record before it as there was no evidence what portion of the attorney's fees solely related to foreclosure activities. Id. at 15.

However, as is addressed above with respect to Cohen's § 1692f(1) claim concerning the Notice, the Court is not required to decide whether Krietzman and Felhaber violated the "permitted by law" prong of the statute because they have not violated the statute's alternative "authorized by the agreement" prong. Therefore, assuming *arguendo* that Krietzman and Felhaber violated Minn. Stat. § 582.01, they still did not violate 15 U.S.C. § 1692f(1). While Beachside's governing documents, which constitute the agreement creating the debt, do not set forth a specific amount of fees to be collected, they do expressly authorize the collection of reasonable attorney's fees. Again, a fixed amount [*49] of attorney's fees is not appropriate given the varying complexity an assessment collection and foreclosure might pose. As a result, the governing documents provide for the collection of "reasonable" attorney's fees, and there is no evidence that the amount charged by Krietzman in this case is not reasonable. Additionally, as stated above, there is no component of late fees included in the lien amount. [8]

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[8] Because Cohen has failed to state a claim for violation of the FDCPA, the Court does not reach consideration of the bona fide error defense. 15 U.S.C. § 1692k(c).

6. Request to Reconsider

In his Opposition Memorandum, Cohen asks for reconsideration of a portion of the previous Order, denying Cohen's appeal of Magistrate Judge Arthur Boylan's Order. Judge Boylan's Order denied allowing Cohen to amend his Complaint to add additional claims for violation of the FDCPA. Krietzman and Felhaber oppose Cohen's request. As an initial matter, Cohen has failed to follow the rules regarding [*50] motions to reconsider. Local Rule 7.1(g) states:

> Motions to reconsider are prohibited except by express permission of the Court, which will be granted only upon a showing of compelling circumstances. Requests to make such a motion, and responses to such requests, shall be made by letter to the Court of no more than two pages in length, a copy of which must be sent to opposing counsel.

Cohen has not submitted a letter requesting permission to make a motion to reconsider. Even if he had, Cohen has not demonstrated any compelling circumstances to support reconsideration. No facts have changed. If Cohen were permitted to amend his Complaint, his claims would fail, as they do not state violations of the FDCPA, for the reasons stated in the Court's previous Order and Judge Boylan's Order. In addition, to the extent Cohen is seeking to have the Court reconsider any of its previous rulings, such as whether or not the voluntary

payment doctrine applies, Cohen's request is denied for the reasons already stated.

D. Claims Against U.S. Bank

Cohen asserts three claims against Defendant U.S. Bank: (1) breach of fiduciary duty, (2) negligence, and (3) violation of Minn. Stat. § 333.01 [*51] for failure to file a certificate of assumed name.

1. Claim for Breach of Fiduciary Duty

U.S. Bank argues that under Minnesota law, a bank is not in a fiduciary relationship with a customer; rather, the relationship is that of debtor and creditor. The only exception to the rule is where the bank knows or has reason to know that the customer is relying on the bank to counsel and inform him. In this case, U.S. Bank argues that it had no reason to know that Cohen was reposing any kind of special trust in U.S. Bank, and nothing in the record supports that the typical debtor-creditor relationship was somehow changed to that of a fiduciary relationship. Cohen responds that the creation of an escrow account for the purpose of paying real estate taxes transforms the ordinary debtor-creditor relationship between a bank and its customer to a fiduciary relationship. Cohen argues that U.S. Bank had a fiduciary duty to administer his escrow account in a competent and professional manner, and that duty was breached when U.S. Bank paid $ 5,920.08 to Beachside from Cohen's escrow account without first contacting Cohen to verify the validity of Beachside's claim.

"Generally, a bank is not [*52] in a fiduciary relationship with a customer, rather the relationship is one of debtor and creditor." Hurley v. TCF Banking & Sav., F.A., 414 N.W.2d 584, 587 (Minn. Ct. App. 1987). In Minnesota, there is no fiduciary relationship between a bank and its customer "unless special circumstances exist, such as where the bank knows or has reason to know that the customer is placing his trust and confidence in the bank and is relying on the bank so to counsel and inform him." Klein v. First Edina Nat'l Bank, 293 Minn. 418, 196 N.W.2d 619, 623 (Minn. 1972). Cohen has provided no evidence that U.S. Bank knew or had reason to know that he was placing his trust and confidence in U.S. Bank. In addition, a review of Cohen's mortgage contract, as well as case law from other jurisdictions considering the status of real estate tax escrow accounts created by mortgages, establishes the relationship between Cohen and U.S. Bank was that of a debtor and a creditor. See Cohen Aff. [Docket No 204] Ex. A;. Judd v. First Fed. Sav. and Loan Ass'n of Indianapolis, 710 F.2d 1237, 1241 (7th Cir. 1983); Kronisch v. Howard Sav. Inst., 161 N.J. Super. 592, 392 A.2d 178, 180-82 (N.J. Super. Ct. App. Div. 1978), [*53] and cases cited therein. U.S. Bank had no fiduciary relationship to Cohen and therefore no duty was breached.

2. Claim for Negligence

U.S. Bank argues that Minnesota law does not permit a negligence action where the duties owed arise exclusively under a contract. U.S. Bank argues that the duties it owed to Cohen were purely contractual in nature, and as a result, Cohen can

not maintain a negligence action against U.S. Bank. Cohen responds that he is not alleging negligent breach of contract but rather that U.S. Bank acted negligently in its capacity as fiduciary of the real estate tax escrow account. Cohen alleges that as a fiduciary, U.S. Bank owed Cohen a duty of care, and it breached that duty of care when it negligently paid $ 5,920.08 to Beachside.

Negligent breach of contract is a cause of action not recognized in Minnesota, and as a result, Cohen has no viable negligence claim on the contract between himself and U.S. Bank. Lampert Lumber Co. v. Joyce, 405 N.W.2d 423, 424 (Minn. 1987). To recover in tort on a claim of negligence, "a plaintiff must prove as one element that the defendant breached 'some duty imposed by law, not merely one imposed by contract. [*54] '" D & A Dev. Co. v. Butler, 357 N.W.2d 156, 158 (Minn. Ct. App. 1984)(citations omitted). Cohen and U.S. Bank's relationship was contractual in nature, and no tort duty was breached. Finally, Cohen states that his negligence claim is based on U.S. Bank's breach of the duty of care in its capacity as a fiduciary. However, as stated above, Cohen and U.S. Bank were not in a fiduciary relationship. Consequently, Cohen's negligence claim fails as a matter of law.

3. Claim for Failure to File Certificate of Assumed Name

U.S. Bank argues that it is not required to file a certificate of assumed name with the Secretary of State, pursuant to Minn. Stat. § 333.01, because the true name of U.S. Bank National Association is set forth in the name U.S. Bank Home Mortgage.

Cohen responds that although the purpose of the statute is not specifically to enable litigants to identify the true name of entities, U.S. Bank is still in violation of the statute. Cohen argues that if U.S. Bank were in full compliance with the requirements of Minn. Stat. § 333.01 without having to file a certificate of assumed name, then its consumer [*55] mortgage division would need to be named "U.S. Bank National Association Home Mortgage." Cohen avers that as a result of U.S. Bank's statutory violation, he is entitled to $ 250 in costs pursuant to Minn. Stat. § 333.06.

Minn. Stat. § 333.01, subd. 1 states that:

> No person shall hereafter carry on or conduct or transact a commercial business in this state under any designation, name, or style, which does not set forth the true name of every person interested in such business unless such person shall file in the office of the secretary of state, a certificate setting forth the name and business address under which the business is conducted or transacted, or is to be conducted or transacted, and the true name of each person conducting or transacting the same, with the address of such person.

Minn. Stat. § 333.001, subd. 2 states that a "person" can include a "corporation." Minn. Stat. § 333.001, subd. 3 defines "true name" to mean "the full corporate name as stated in its articles, if a corporation." Minn. Stat. § 333.06 states: "If [any

[*56] person conducting a business contrary to the terms of sections 333.001 to 333.06] defends against a civil action, the plaintiff shall be entitled to tax $ 250 costs, regardless of which party prevails upon the merits."

As one might expect, there is very little case law interpreting the foregoing statutes. However, the Minnesota Court of Appeals has said that "[t]he purpose of Minnesota tradename law is to protect the integrity of tradenames and to protect corporate creditors. It is not for the purpose of providing the public with a means to ascertain the correct name of an entity to properly designate it in a lawsuit." Watson v. Stonewings on the Lake, 393 N.W.2d 518, 520 (Minn. Ct. App. 1986). In Watson, plaintiffs sought to avoid their failure to serve the summons and complaint on defendant within the two-year statute of limitations period by asserting that Stonewings' failure to register its tradename prevented them from ascertaining Stonewings' correct legal identity. Id. The plaintiffs were able to execute service on Phil Eder of Phil Eder Enterprises, Inc., d/b/a Stonewings on the Lake, even though "Stonewings on the Lake" was not registered as a [*57] tradename with the secretary of state. Id. at 519. The court held that even though "filing tradenames with the secretary of state's office may serve an unintended purpose of providing information to prospective litigants," plaintiffs had not established the necessary elements for the court to estop defendant from asserting the statute of limitations as a defense. Id. at 520.

In this case, U.S. Bank's Certificate of Corporate Existence shows that its full name is U.S.

Bank National Association. Nauen Aff. [Docket No. 165] Ex. 7. Cohen's mortgage contract was with an entity named U.S. Bank Home Mortgage. U.S. Bank National Association is doing business as U.S. Bank Home Mortgage but has not filed a certificate of assumed name with the secretary of state. While the words "National Association" are not included in U.S. Bank's "Home Mortgage" name, it has complied with the spirit of the law by including "U.S. Bank," the words that effectively provide U.S. Bank with its identity and make it readily recognizable to the public. This is not a case like Watson where the assumed name, Stonewings on the Lake, gave no indication whatsoever as to the identity [*58] of the underlying corporation, Phil Eder Enterprises, Inc. On the contrary, U.S. Bank is a nationally known corporation, and there is no evidence that Cohen encountered any serious problems in serving the proper Defendants in this case. Keeping the stated purpose of Minn. Stat. § 333.01 in mind, an award of statutory costs pursuant to Minn. Stat. § 333.06 is not appropriate. Consequently, summary judgment is granted for U.S. Bank with respect to all of Cohen's claims against it.

4. Summary Judgment Not Premature

As a final matter Cohen alleges summary judgment is premature against U.S. Bank. Cohen states that Magistrate Judge Mayeron has not yet ruled on his Motion to Compel [Docket No. 136] U.S. Bank to produce additional documents. Cohen argues that the requested documents will contain

further evidence that U.S. Bank violated its policies regarding real estate tax escrow accounts.

Summary judgment is not premature. This case was filed on April 7, 2005, giving the parties ample time to conduct discovery.

E. Cohen's Remaining Claims

Cohen's remaining claims against Defendant Beachside assert breach of contract [*59] and violation of Minnesota statutes. Cohen no longer has any federal claims against any Defendants, and as a result, the Court declines to exercise supplemental jurisdiction over Cohen's remaining state law claims. 28 U.S.C. § 1367(c)(3); Gibson v. Weber, 433 F.3d 642, 647 (8th Cir. 2006).

IV. CONCLUSION

Based upon the foregoing, and all the files, records, and proceedings herein, **IT IS HEREBY ORDERED** that:

1. Defendant Beachside Two-I Homeowners' Association's Motion for Partial Summary Judgment [Docket No. 157] is **GRANTED;**

2. Defendants Fredrick R. Krietzman and Felhaber, Larson, Fenlon & Vogt, P.A.'s Motion for Summary Judgment [Docket No. 167] is **GRANTED;**

3. Defendant U.S. Bancorp d/b/a U.S. Bank Home Mortgage's Motion for Summary Judgment [Docket No. 162] is **GRANTED;** and

4. Plaintiff Glenn S. Cohen's request for reconsideration [Docket No. 227] of his Motion for Leave

to Amend Memorandum of Law in Opposition to Defendant Beachside's Motion for Partial Summary Judgment [Docket No. 222] is **DENIED;**

5. Plaintiff's Motion for Summary Judgment [Docket No. 189] is **DENIED AS MOOT;**

6. [*60] The Court declines to exercise supplemental jurisdiction over Plaintiff's remaining state law claims. The federal case is **DISMISSED.**

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:

s/ Ann D. Montgomery

ANN D. MONTGOMERY

U.S. DISTRICT JUDGE

Dated: June 29, 2006.

MAGISTRATE JUDGE'S ORDER, 9/20/2005

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Glenn S. Cohen, Civil No. 05-706 ADM/JSM

Plaintiff,

v.

ORDER ON MOTIONS FOR LEAVE TO AMEND THE COMPLAINT

Beachside Two-I Homeowner' Association; Fredrick R. Krietzman; Felhaber, Larson, Fenlon & Vogt, a Professional Association; U.S. Bancorp, d/b/a U.S. Bank Home Mortgage,

Defendants.

This matter is before the Court, Magistrate Judge Arthur J. Boylan, on plaintiff's motion for leave to amend the complaint to allege punitive damages and to state additional causes of action [Docket No. 54]. By separate motion plaintiff seeks leave to amend to allege additional evidence with respect to Count 13 in the amended Complaint [Docket No. 66]. Hearing was held on September 12, 2005, at the U.S. Courthouse, 316 No. Robert St., St. Paul MN 55101. Plaintiff Glenn S. Cohen, appeared and argued pro se. Paul C. Peterson, Esq., appeared on behalf defendants Fredrick Krietzman and the Felhaber, Larson, Fenlon &

Vogt law firm. Thomas A. Gilligan, Esq., appeared on behalf of defendant Beachside Two-I Homeowners' Association. David J. Zoll, Esq., appeared on behalf of defendant US Bancorp.

Based upon the file, memorandums, and arguments of counsel, **IT IS HEREBY ORDERED** that:

1. Plaintiff's Motion for Leave to Plead Punitive Damages is **denied** [Docket No. 54]. In addition, plaintiff's motion to amend the complaint to include revisions to existing claims and to state new claims under the FDCPA and to assert tort claims for abuse of process, conversion, negligent infliction of emotional distress, and invasion of privacy by publication of private facts is **denied**.

2. Plaintiff's Motion for Leave to Amend the Complaint to assert additional evidence with respect to Count 13 of the amended complaint is **denied as moot** [Docket No. 66]. There can be no further amendments or revisions to Count 13 in light of the Court's refusal to grant plaintiff leave to amend the complaint to allege Count 13.

Dated: September 20, 2005

s/ Arthur J. Boylan

Arthur J. Boylan

United States Magistrate Judge

MEMORANDUM

Plaintiff Glenn Cohen became the owner of a townhome in a planned development in Minnetonka, Minnesota, in 1997. Defendant Beachside Two-I Homeowners' Association is the administra-

tor of the development and Cohen's property ownership was subject to various rules, regulations and assessments imposed by the association. Defendant Fredrick Krietzman is an attorney for Beachside Two-I and is a member of the Felhaber, Larson, Fenlon & Vogt law firm. Cohen failed to make timely payments of monthly assessments in 2003, thereby leading Krietzman to have a lien placed on the townhome. The lien remained unsatisfied and therefore, in early 2004, the Beachside Two-I board of directors authorized foreclosure by advertisement proceedings. Meanwhile, the property was subject to a mortgage from defendant US Bancorp. Upon notice of the foreclosure action US Bancorp satisfied the lien with payment in the total amount of $5,920.08, which included fees in the amount of $2,655.06 for legal services and expenses provided by defendants Krietzman and the Felhaber firm. US Bancorp applied the additional lien satisfaction amount to plaintiff's mortgage escrow account and subsequently received satisfaction when Mr. Cohen sold the townhome in November 2004. Plaintiff commenced this lawsuit in April 2005. The initial 12-count complaint alleges several breach of contract claims against defendant Beachside Two-I relating to the collection of late fees, attorney fees and assessments. The complaint further includes an improper foreclosure claim against Beachside Two-I; a libel claim against Beachside Two-I; a claim under the Fair Debt Collection Practices Act against defendants Krietzman and Felhaber, Larson, Fenlon & Vogt; and claims against US Bancorp for negligence, breach of fiduciary duty and violation of Minn. Stat. §333.06. Plaintiff now seeks to allege six more counts, including two additional

debt collection practices claims against the attorneys, a claim for abuse of process against the attorneys and Beachside Two-I, a claim against Beachside Two-I for invasion of privacy, and conversion and negligent infliction of emotional distress claims against all defendants. Finally, plaintiff seeks punitive damages from Beachside Two-I, Krietzman and Felhaber, Larson, Fenlon & Vogt.

Fed. R. Civ. P. 15(a) permits amendment to the complaint by leave of court and mandates that leave be freely given when justice requires. Important considerations are whether defendant is prejudiced by the amendment and whether the proposed amendment asserts a futile claim. Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 230 (1962). The court may refuse to permit amendment to assert claims which could not survive motion to dismiss. Weimer v. Amen, 870 F.2d 1400, 1407 (8th Cir. 1989). Essentially, however, the granting of a motion to amend a pleading lies in the sound discretion of the trial court. Upsher-Smith Laboratories, Inc. v. Mylan Laboratories, Inc., 944 F.Supp. 1411, 1442 (D. Minn. 1996). It is the policy of the federal courts, as instructed by the Federal Rules, to adhere to the principle that the purpose of pleading is to facilitate a proper decision on the merits.

Id. at 1441 (citing Foman v. Davis, 83 S.Ct. at 229-30).[1]

Abuse of Process. Plaintiff moves to allege abuse of process against the defendant attorneys and Beachside Two-I. Abuse of process is the misuse of legal process to attain an end other than that which the process was designed to accomplish. Hoppe v. Klapperich, 28 N.W.2d 780, 786 (Minn. 1947). The elements of a cause of action for abuse of process are the existence of an ulterior purpose and the act of using the process to accomplish a result outside the scope of the proceeding in which the process was issued. Id. Plaintiff contends that the defendants' ulterior purpose in the instance was the collection of attorney fees, assessments and other fees that they were not entitled to collect through the process of foreclosure by advertisement. The Court finds no evidence to support that contention that the collection of fees was an ulterior motive behind the foreclosure action and further concludes that as a matter of law the collection of such fees was neither a primary purpose of the

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[1] Plaintiff argues that this motion is subject to the liberal standards for amending pleadings under Fed. R. Civ. P. 15 rather the evidentiary standards for summary judgment under Rule 56. However, summary judgment can be ordered on the court's own motion. Kellar v. Von Holtum, 568 N.W.2d 186, 192 (citing Modern Heating and Air Conditioning, Inc. v. Loop Belden Porter, 493 N.W.2d 296, 299 n.2 (Minn. App. 1992)). The Court concludes that the claim fails under either the pleadings amendment standard or a summary judgment standard. The Court also notes that plaintiff has filed a multitude of documents which are submitted as an evidentiary basis for his claims and are contained in the record as exhibits to plaintiff's proposed amended complaint.

foreclosure proceeding nor a purpose outside the scope of the foreclosure proceeding. Kellar v. Von Holtum, 568 N.W.2d 186, 192 (Minn. App. 1997). The claim of abuse of process in this instance is essentially frivolous. The motion to amend the complaint to add the claim is denied and the claim cannot provide an underlying basis for punitive damages.

Conversion. Plaintiff also seeks to allege a conversion claim against all defendants. Conversion is "an act of willful interference with the personal property of another, done, without lawful justification, by which any person entitled thereto is deprived of use and possession." Christensen v. Milbank Ins. Co., 658 N.W.2d 580, 585 (Minn 2003). The elements of common law conversion are (1) possession of a property interest in the plaintiff and (2) defendant has deprived plaintiff of thatinterest. Lassen v. First Bank Eden Prairie, 514 N.W.2d 831, 838 (Minn. App. 1994). Plaintiff generally contends that defendants interfered with his escrow account with US Bancorp and this interference constitutes grounds for a conversion claim. Defendant US Bancorp contends that plaintiff is essentially alleging interference with contract rights which cannot be transformed into a tort action for conversion; the defendant attorneys argue that plaintiff had no rights in property which were wrongfully misappropriated; and defendant Beachside Two-I asserts that its interference with plaintiff's escrow account was legally justified. The Court finds that defendants' respective positions are well taken and that the claim of conversion by any defendant in this action is without merit and

would be futile. Plaintiff presents no persuasive evidence to support a claim that defendant appropriated his property by any means other that proper legal channels. See Naegele Outdoor Advertising, Inc. v. Minneapolis, 551 N.W.2d 235, 238 (Minn. App. 1996). Indeed, the Court concludes that the release or possession of escrow funds by any defendant was legally justified under provisions of contract and/or mortgage documents which established the relationships between the parties in this matter. See Balasuriya v. Bemel, 617 N.W.2d 696, 601 (Minn. App. 2000). The motion to amend to allege conversion is denied and the claim does not provide grounds for punitive damages .

Negligent Infliction of Emotional Distress. Plaintiff further moves to amend to allege negligent infliction of emotional distress against all defendants. To establish a claim for negligent infliction of emotional distress plaintiff must show that he was in a zone of danger; that he reasonably feared for his own safety; and that he suffered severe emotional distress with attendant physical manifestations. K.A.C. v. Benson, 527 N.W.2d 553, 557 (Minn. 1995). Recovery of damages for negligent infliction of emotional distress is available only under circumstances in which it is abundantly clear that the plaintiff was in grave personal peril for some specified period of time. Id. at 558. In this instance the proposed amended complaint states that defendant's behavior has caused plaintiff to become worried, upset, and nervous. Plaintiff has never been placed in personal peril, has had no cause to reasonably fear for his safety, and has not suffered the requisite physical manifestations. The claim is

insufficient on its face and is futile. Punitive damages are not available to plaintiff on a claim of negligent infliction of emotional distress .

Invasion of Privacy. Plaintiff moves to amend to allege a claim against Beachside Two-I for invasion of privacy by publication of private facts. It is alleged that on two separate occasions Beachside published board meeting minutes which stated by inference that plaintiff was delinquent in paying his assessments. To state a claim the plaintiff must show that defendant has publicized a matter concerning his private life, that the publicity is of a kind that would be highly offensive to a reasonable person, and that the matter is not of legitimate concern to the public. Bodah v. Lakeville Motor Express, Inc., 663 N.W.2d 550, 553 (Minn 2003). In this context publicity means that the matter has been communicated to the public at large or with substantial certainty the that the matter would become one of public knowledge. Id. at 553-54 (citing Restatement (Second) of Torts §652D, comment a). The matter at issue here was not communicated to the public at large and is not highly offensive to a reasonable person. The claim is patently futile and does not support a punitive damages claim.

FDCPA Claims. Plaintiff requests leave to amend to add two counts alleging violation of the Fair Debt Collection Practices Act by the defendant

attorneys.[2] The claims relate to letters in which defendants allegedly made false, deceptive, and misleading representations in regard to the collection of assessments, attorney fees and late fees. Plaintiff alleges that certain letters dated May 5, 2004,[3] were unauthorized third parties communications in violation of 15 U.S.C. §1692c(b), and contained threats to take unlawful action in violation of 15 U.S.C. §1692e(5); he asserts that the May 14, 2004, letter[4] was in violation of 15 U.S.C. §1692c(b) as well as several provisions of §1692e relating to the use of false representation to collect a debt, and provisions of §1692f relating to the use of unfair means to collect a debt. It is alleged that the June 8, 2004,[5] communication contained false representations in violation of 15 U.S.C. §1692e(2)(A). Defendants contend this case involves lien enforcement activities rather that debt collection practices and therefore the FDCPA does not apply in this instance.

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[2] Count 13 alleges violation of the FDCPA with respect to May 5, 2004, and May 14, 2004, letters. Count 14 alleges FDCPS violation in regards to a June 8, 2004, letter. The May 5, 2004, and May 14, 2004, letters were not addressed to the plaintiff, but rather, the letters were communications to third parties advising those parties of lien foreclosure activities. The June 8, 2004, communication was made to the plaintiff and consisted of a lien satisfaction and release.

[3] Exhibit P to plaintiff's proposed amended complaint [Docket No. 66].

[4] Exhibit Q to plaintiff's proposed amended complaint [Docket No. 66].

[5] Exhibit N to Affidavit of Glenn S. Cohen in support of motion to amend [Docket No. 57].

Homeowner's association assessments and other financial obligations arising out of association by-laws, covenants, and declaration, may indeed be construed as a "debt" which is subject to provisions of the FDCPA. Newman v. Boehm, Pearlstein & Bright, Ltd., 119 F.3d 477, 481-82 (7th Cir. 1997). However, debt collection activities are distinct from actions relating to enforcement of security interests, i.e. liens, and security enforcement activities are generally outside the scope of the FDCPA. Rosado v. Taylor, 324 F.Supp.2d 917, 924 (N.D. Ind. 2004)(citing 15 U.S.C. §1692a(6)). The letters dated May 5, 2004, were send to third parties who had an lien interest in the plaintiff's property to advise them of foreclosure proceedings. The letters were accompanied by a copy of the published Notice of Assessment Foreclosure Sale. They were sent for the purpose of providing legal notice with respect to lien enforcement and were not sent in connection with debt collection as contemplated in the FDCPA. The letter dated May 14, 2004, was sent to US Bancorp to advise them of the full amount needed to be paid to satisfy the assessment lien. Again, the letter relates to lien enforcement and was not sent in connection with debt collection activities under the FDCPA. Finally, the June 8, 2004, satisfaction and release was sent to plaintiff to advise him that US Bancorp had paid his assessments and the lien foreclosure had therefore been stopped. Although it is arguable that issues relating to this letter are complicated by the bold disclaimer on the cover letter stating "THIS LETTER AND RELATED COMMUNICATIONS ARE ATTEMPTS TO COLLECT A DEBT AND ANY INFORMATION WILL

BE USED FOR THAT PURPOSE. THIS COMMUNICATION IS FROM A DEBT COLLECTOR," it is clear that the true subject matter of the communication is lien foreclosure rather than debt collection. Apart from the disclaimer, the letter contains no communication that could be construed to constitute an abusive debt collection practice by a debt collector that the FDCPA was enacted to prevent. Montgomery v. Huntington Bank, 346 F.3d 693, 698 (6th Cir. 2003). In addition, to the extent that the June 8, 2004, letter to plaintiff could be viewed have connection to a collection activity, the communication was sent to advise him that further foreclosure and collection efforts were being terminated and therefore the letter was authorized under 15 U.S.C. §1692c(c)(1). While in this instance the FDCPA provisions cited by the plaintiff each prohibit debt collectors from taking certain actions in connection with the collection of a debt, the letters at issue with respect to proposed Counts 13 and 14 of the proposed amended complaint are not communications in connection with debt collection as a matter of law and are not otherwise subject to the FDCPA. Plaintiff's motion to amend to allege additional claims under the Fair Debt Collection Practices Act is denied.

Punitive Damages. Plaintiff moves to allege a claim for punitive damages against the attorney defendants and Beachside Two-I. Minn. Stat. § 549.191 provides that claims for punitive damages in civil actions under Minnesota law may not be alleged upon commencement of the action. The party seeking punitive damages must move to amend the pleadings and must allege the applicable legal basis

for awarding such damages. In Minnesota federal courts punitive damages claims which are premised upon causes of action under Minnesota law must be pled in conformity with Minnesota pleading requirements. Ulrich v. City of Crosby, 848 F. Supp. 861, 867 (D. Minn. 1994). Minn. Stat. §§ 549.191 and 549.20 require a punitive damages claimant to make a prima facie showing that there is clear and convincing evidence of deliberate disregard of the claimant's rights. Gamma-10 Plastics, Inc. v. American President Lines, Ltd., 32 F.3d 1244, 1255 (8th Cir. 1994)(*cert. denied* 115 S.Ct. 1270 (1995)). The Court must independently ascertain whether there exists prima facie evidence that the defendant acted with deliberate disregard for the rights and safety of others. Ulrich v. City of Crosby, 848 F.Supp. 861, 868-69.

Plaintiff's claim for punitive damages is based upon his contention that defendants Beachside, Krietzman and the Felhaber firm engaged in egregious and malicious efforts to collect assessments and attorneys fees with knowledge that the fees were excessive and were demanded in deliberate and conscious disregard for plaintiff's rights under state law. Plaintiff argues that the collections were rendered egregious because the defendants had knowledge of the laws on mortgage foreclosure and the attorneys in particular had special expertise with respect to applicable Minnesota statutes, yet acted to demand and collect accelerated assessments and excessive attorney fees in deliberate and conscious disregard for plaintiff's rights under state law.

In considering whether a prima facie case for punitive damages has been established, the Court is mindful that evidence properly submitted in support of a motion for leave to allege punitive damages should be thoroughly examined without considering evidence offered in opposition. Northwest Airlines v. American Airlines, 870 F.Supp. 1499, 1503 (D.Minn. 1994)(citing Swanlund v. Shimano Indus. Corp., 459 N.W.2d 151, 154 (Minn. App. 1990)). The Court must review evidence as it would on motion for directed verdict and on this evidence must consider whether defendant's conduct reaches a heightened threshold level of culpability. Ulrich v. City of Crosby, 848 F.Supp. at 867.

In this instance plaintiff relies upon evidence that is offered to establish the attorneys' experience and expertise with respect to real estate matters and creditor's rights. From this evidence the Court is asked to infer that these defendants had absolute knowledge of the pertinent law, that collection actions undertaken by them were in violation of those laws, and that these facts constitute evidentiary grounds for punitive damages. To the contrary, however, the Court finds no direct evidence to warrant a claim for punitive damages in this matter and finds to justification for an inference that any defendants in this action has willfully acted in violation of the law with a deliberate disregard for plaintiff's rights. In particular, plaintiff has not presented clear and convincing evidence of a deliberate disregard for his rights and therefore has not met the pleading requirements of Minn. Stat. §§ 549.191 and 549.20. The complaint may not be amended to assert punitive damages for these rea-

sons in addition to his failure to effectively allege underlying common law tort claims for conversion, abuse of process, invasion of privacy, or negligent infliction of emotional distress.

REPRINT OF 15 U.S.C. § 1692a

§ 1692a. Definitions

As used in this title [15 USCS §§ 1692 et seq.]--

(1) The term "Commission" means the Federal Trade Commission.

(2) The term "communication" means the conveying of information regarding a debt directly or indirectly to any person through any medium.

(3) The term "consumer" means any natural person obligated or allegedly obligated to pay any debt.

(4) The term "creditor" means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.

(5) The term "debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.

(6) The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who,

in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. For the purpose of section 808(6) [15 USCS § 1692f(6)], such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. The term does not include--

(A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;

(B) any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts;

(C) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties;

(D) any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;

(E) any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors; and

(F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental

to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

(7) The term "location information" means a consumer's place of abode and his telephone number at such place, or his place of employment.

(8) The term "State" means any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any political subdivision of any of the foregoing.

REPRINT OF MINN. STAT. § 582.01

582.01 ATTORNEY'S FEES

Subdivision 1. Contractual fees.

The mortgagor may, in the mortgage, covenant to pay or authorize the mortgagee to retain an attorney's fee in case of foreclosure; but such fees in case of foreclosure by advertisement shall not exceed the following amounts, and any provision for fees in excess thereof shall be void to the extent of the excess:

	Date of execution of mortgage		
The original principal amount secured by the mortgage	Before June 2, 1953	After June 1, 1953 and before June 1, 1971	After May 31, 1971
Less than $ 500	$ 25	$ 50	$ 150
$ 500-$ 1,000	50	75	150
$ 1,000-$ 5,000	75	125	150
$ 5,000-$ 10,000	100	175	225
Exceeding $ 10,000	200	225 plus $ 50 for each additional $ 10,000 or major fraction thereof	275 plus $ 35 for each additional $ 5,000 or major fraction thereof

Subd. 1a. Foreclosure by advertisement.

Notwithstanding subdivision 1 to the contrary, the minimum fee for foreclosure by advertisement of mortgages executed after July 31, 1992, is $ 500.

Subd. 2. Foreclosure by action.

The court shall establish the amount of the attorney's fee in case of foreclosure by action.

Subd. 3. When default less than 30 days.

If at the time of the commencement of the foreclosure proceedings, all of the items constituting said default were less than 30 days past due, then upon redemption the mortgagor shall not be required to pay the attorney's fee authorized in this section. This subdivision shall apply only to mortgages executed after May 31, 1971.

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HEADLINE: Mortgage Foreclosures Reach All-Time High;
New Worries Send Stocks Into Dive

BYLINE: Renae Merle and Tomoeh Murakami Tse; Washington Post Staff Writers

BODY:

Stocks on Wall Street fell sharply yesterday with fresh concerns over the health of financial firms that have invested heavily in mortgage-backed securities and a new report showing that more homeowners had fallen into foreclosure than ever before.

The crisis in home lending reached another milestone with the report from the Mortgage Bankers Association, which said that 2.04 percent of outstanding mortgages were in foreclosure in the

fourth quarter of last year, an all-time high. A year earlier, 1.19 percent of loans were in foreclosure.

The data didn't surprise economists, who expect foreclosures to continue to rise through most of this year despite government and industry efforts to keep borrowers in their homes. The announcement came the same day as a Federal Reserve study showing that last year, owner equity in U.S. homes fell below 50 percent, meaning it is exceeded by mortgage debt, for the first time since 1945.

"Unfortunately, we're not close to bottoming out," said Guy D. Cecala, publisher of Inside Mortgage Finance.

Dragged down by bad news from the mortgage sector and fears of a worsening credit crisis, the Dow Jones industrial average of 30 blue-chips stocks plunged 214.60 points, or 1.8 percent, to 12,040.39. The broader Standard & Poor's 500-stock index fell 29.36, or 2.2 percent, to 1304.34. The Nasdaq composite index declined 52.31, or 2.3 percent, to 2220.50.

Financial shares fell furthest, dropping 3.7 percent.

Investors started the day with news that the residential lender Thornburg Mortgage and a bond fund managed by the D.C. private-equity firm Carlyle Group failed to meet margin calls. A margin call occurs when an investor buys a security with borrowed money and then the value of the security declines so far that the lender insists that its holder put up more money to cover it.

Thornburg Mortgage said late Wednesday that it had failed to meet a margin call of $28 million. The company's shares lost 51 percent yesterday. Then Carlyle Capital said yesterday morning that it failed to meet banks' margin calls on its $21.7 billion portfolio of AAA- rated mortgage-backed securities.

The worsening credit turmoil is infecting even the highest-rated securities and has spilled into areas long considered ultra-safe. Carlyle Capital was heavily leveraged, using about $670 million in cash equity to finance the $21.7 billion portfolio of top-rated mortgage-backed securities issued by Freddie Mac and Fannie Mae.

In the past year, home values have plummeted across much of the country, staggering those invested in mortgage-related securities and the homeowners themselves.

The spike in foreclosures reported yesterday was most pronounced in California and Florida, which together accounted for 30 percent of the foreclosures started during the quarter, according to the Mortgage Bankers Association, an industry group. Nationally, the default rate was markedly high among homeowners with adjustable-rate loans, particularly those with subprime loans. Of the foreclosures started during the quarter, 42 percent of homeowners had adjustable-rate subprime loans and 20 percent had adjustable-rate prime loans.

The proportion of homeowners delinquent on their mortgages but not yet in foreclosure reached 5.82 percent during the quarter, the highest level

since 1985. That was up from 4.95 percent during the fourth quarter of 2006.

Some parts of the country could start seeing a market recovery by this summer, said Jay Brinkmann, vice president of research and economics at the association. "Recovery is going to differ in different parts of the country," he said.

In the Washington region, foreclosure rates were below the national level: In the District, 1 percent of loans were in foreclosure; in Virginia, 1.01 percent; and in Maryland, 1.22 percent.

The figures include the period when the industry began to promote efforts to help homeowners avoid foreclosure. But it is difficult to measure the impact of those efforts in the latest figures, Brinkmann said. Some of the delinquent homeowners included in the report may have caught up on their payments or sold their homes, he said.

Industry and government efforts, including a program to freeze mortgage rates for some subprime borrowers, have been called insufficient by some community groups and analysts. The initiatives are going to "help some people and stop some foreclosures," said Mike Larson, housing analyst for Weiss Research, "but as long as home prices are falling, you're swimming against the tide."

The rise in foreclosures is also tied to the number of people who find themselves in homes worth less than the balance of their mortgages, Larson said. "You might fight to pay your mortgage if you have a profit," he said. But given the number of people with high mortgages and "the magnitude of home price declines, a lot of them are underwater,"

meaning their homes are worth less than they owe. "They don't have an incentive to pay, and they don't."

Those borrowers are making a practical decision to walk away from their homes, said David Shulman, senior economist at UCLA Anderson Forecast. A San Diego firm, You Walk Away, is offering to help people arrange an orderly foreclosure of their home for $950, including filing a letter that would order the lender to stop calling about delinquency.

"Foreclosure is becoming a financial planning tool," Shulman said. "There is less of an emotional attachment. Homeowners are acting like a business would act in a similar circumstance by walking away."

Tse reported from New York.

Supreme Court, U.S.
FILED
SEP 24 2008
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No. 08-241

In the Supreme Court of the United States

Glenn S. Cohen,

Petitioner,

v.

Beachside Two-I Homeowners' Association; Fredrick R. Krietzman; Felhaber, Larson, Fenlon & Vogt, A Professional Association; and U.S. Bancorp, d/b/a U.S. Bank Home Mortgage,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692, apply to foreclosures of security interests in real property?

Did the courts below err in concluding that collecting reasonable attorney fees in a foreclosure action, where the underlying documents authorize those fees, is not a violation of the FDCPA, 15 U.S.C. § 1692f(1)?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondent Felhaber, Larson, Fenlon & Vogt, P.A. is a professional association. It has no corporate parent and no publicly traded corporation owns more than 10% of its stock.

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INTRODUCTION

Petitioner Glenn R. Cohen has failed to establish a compelling reason for granting certiorari in this case. This case is simple. Petitioner stopped paying the monthly association assessments for his townhome. The Association, Respondent Beachside Two-I Homeowners' Association, hired Respondents Fredrick R. Krietzman and Felhaber, Larson, Fenlon & Vogt, P.A. (collectively "Felhaber") to foreclose on a lien on Petitioner's townhome to recover the overdue assessments. Felhaber notified Petitioner of the intent to pursue a foreclosure, and then proceeded with the foreclosure and filed the necessary papers with the county and notified the mortgagees of Petitioner's townhome. After one of the mortgagees, Respondent U.S. Bancorp, paid the lien, Felhaber notified Petitioner that the foreclosure was cancelled.

Petitioner incorrectly asserts that a significant split exists among the United States Courts of Appeal regarding the scope of the FDCPA. A review of the decisions shows no split. The District Court explicitly assumed that the FDCPA applied to the allegations Petitioner made, but found no violation of the Act. The Eighth Circuit Court of Appeals, in an unpublished decision, affirmed. Further appellate review is not appropriate because the courts below did not err in finding no violation of the FDCPA.

STATEMENT OF THE CASE

This appeal concerns Petitioner's claims of violations of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.* Every unit in the townhome association where Petitioner lived was subject to monthly assessments. The Association had a lien on each unit to ensure payment of the assessments, plus costs and attorney fees. After Petitioner fell several months behind on his assessments and refused to pay what he owed, the Association hired the Felhaber law firm to foreclose on the lien. A mortgagee bank ultimately paid off the lien, which included Felhaber's fees.

Petitioner sued various respondents and asserted a whole host of state and federal claims (*i.e.* claims of defamation, negligent infliction of emotional distress, violation of the FDCPA, negligence, breach of fiduciary duty, breach of contract, and violation of various Minnesota statutes).

The Magistrate Judge denied Petitioner's motion to amend the Complaint to add even more claims (additional FDCPA claims, abuse of process, conversion, an additional claim of negligent infliction of emotional distress, invasion of privacy, and punitive damages), finding the claims to be frivolous. Petition at 96a. The Magistrate Judge reviewed the proposed additional FDCPA claims, which concerned different letters that Felhaber sent. Two of the letters were sent not to Petitioner, but to financial institutions. The letters were notices of the impending foreclosure sale to those with a financial interest in the property. A final letter was Felhaber's letter to Petitioner advising that U.S. Bancorp had satisfied the lien and that the foreclosure had been

halted. Petition at 105a. The Magistrate Judge concluded that the letters were "not communications in connection with debt collection as a matter of law and are not otherwise subject to the FDCPA." *Id.* at 106a. Petitioner appealed the Magistrate Judge's Order. The District Court rejected the appeal, concluding that the Magistrate Judge's "Order with respect to the proposed additional FDCPA claims is not clearly erroneous or contrary to law." Petition at 40a.

The District Court later granted summary judgment to Felhaber and the other respondents. Petition at 49a.

Petitioner appealed. In an unpublished decision, the United States Court of Appeals for the Eighth Circuit affirmed. Petition at 1a. It did so pursuant to Eighth Circuit Rule of Appellate Procedure 47B. *Id.* at 3a. Rule 47B permits such an affirmance "if the court determines an opinion would have no precedential value" and other circumstances exist. The Eighth Circuit also denied a petition for rehearing and a petition for rehearing en banc. Petition at 4a.

REASONS FOR DENYING THE PETITION

Contrary to Petitioner's argument, the courts below did not conclude that the FDCPA does not apply to foreclosures of security interests in real property. Instead, the courts concluded that there were no violations of the FDCPA under the facts of this case.

A. The decision below did not create a substantial split among the United States Courts of Appeal.

Petitioner improperly tries to puff his case into something it is not, and ignores that the Eighth Circuit affirmed without an opinion. Even assuming the unpublished decisions of the Eighth Circuit Court of Appeals and of the District Court for the District of Minnesota have any precedential value, the decisions are not in conflict with decisions of other United States Courts of Appeal.[1]

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[1] The 2005 and 2006 decisions from the Magistrate Judge and the District Court that Petitioner challenges were unpublished. Under controlling authority, those decisions were not precedential. Eighth Circuit Rule of Appellate Procedure 32.1A makes clear that "[u]npublished opinions issued before January 1, 2007, generally should not be cited." Although Federal Rule of Appellate Procedure 32.1 removed any prohibition on citation to unpublished decisions issued on or after January 1, 2007, the rule said "nothing about what effect a court must give to one of its unpublished opinions or to the unpublished opinions of another court." FRAP 32.1, Committee Note (2006 Adoption). While the Eighth Circuit's decision was issued after January 1, 2007, the Eighth Circuit determined that its summary affirmance, issued without an opinion, had no precedential value. *See* Eighth Circuit Rule of Appellate Procedure 47B.

Petitioner claims the Eighth Circuit created a circuit split "by affirming the Minnesota District Court's affirmance of a Magistrate Judge's ruling . . .." Petition at 3. Petitioner strains to create a circuit split that does not exist. No split has been created.

Petitioner recognizes that when the District Court granted summary judgment to Felhaber, the District Court did not address the very issue Petitioner argues is of urgent significance – whether foreclosure is a debt collection activity subject to the FDCPA. Petition at 8 ("The District Court did not reach this question of law in its 6/29/2006 Order . . ."). What Petitioner fails to mention is that the District Court assumed that a lien foreclosure is debt collection under the FDCPA and that the Act applies. Petition at 71a-72a. The District Court concluded, however, that Petitioner's FDCPA claims failed for other reasons. *Id.* at 72a. Thus, the fundamental point Petitioner asserts as a basis for *certiorari* review – a circuit split – does not exist.

In reviewing Petitioner's appeal of the Magistrate Judge's decision, the District Court explicitly considered the authority Petitioner cited from other circuits, but concluded that they were either "factually distinguishable or inapposite." Petition at 40a. The District Court simply concluded that the Magistrate Judge's "application of the summary judgment standard was not clearly erroneous or contrary to law within the context of this case" when the Magistrate Judge denied Petitioner's motion to amend the complaint. Petition at 38a. A district court's review of a magistrate judge's order addressing a nondispositive pretrial matter is extremely deferential. 28 U.S.C. § 636(b)(1)(A); *see also* D. Minn. LR 72.2(a) ("District

Judge . . . shall modify or set aside any portion of the Magistrate Judge's order found to be clearly erroneous or contrary to law").

Petitioner makes erroneous and sweeping assertions as to what the decisions below mean. There is no "question of exceptional national importance" presented as Petitioner contends. Petition at 8. Not surprisingly, a citation check reveals that no court has cited the Eighth Circuit's unpublished and summary affirmance in this case.

Contrary to Petitioner's suggestion, the courts below did not hold that activities in connection with foreclosures are exempt from the FDCPA. The Eighth Circuit and the District Court did not adopt the allegedly erroneous rule of law that Petitioner contends was adopted. Instead, the District Court specifically assumed "that lien foreclosure constitutes debt collection under the FDCPA," but found that Petitioner's FDCPA claims failed otherwise. Petition at 72a. Accordingly, this Court should deny the Petition.

B. The courts below correctly concluded that the recovery of reasonable attorney fees in the foreclosure proceeding did not violate the FDCPA.

The second question Petitioner presents also does not merit this Court's review. The fee question raised – Petitioner's challenge as to the collection of $1,738 in attorney fees – simply involves the interpretation of a Minnesota statute and the language of the Association's Declaration and By-Laws. It is not a question of importance that this Court should review. Petitioner incorrectly construes a Minnesota statute regarding the amount of attorney fees that might be recovered in a foreclosure by advertisement action. The agreements between the Association and Petitioner permitted the reasonable attorney fees that Felhaber recovered.

The District Court recognized that the FDCPA applies to foreclosures, but simply found on the facts of this case that no FDCPA violation occurred because the attorney fees collected were not greater than the amount Minnesota law permits. There is no circuit split and no suggestion that a group of activities is sheltered from compliance with the FDCPA. To the contrary, the District Court specifically recognized that Felhaber could be "in violation of the FDCPA if they have collected an amount of attorney's fees greater than that permitted by law." Petition at 20a. The District Court carefully reviewed the relevant Declaration and the applicable Minnesota statutes and concluded that Felhaber's fees were not a violation of the FDCPA because the

fees were both authorized and reasonable. Petition at 29a, 76a-79a.

CONCLUSION

This Court should deny the Petition for Writ of Certiorari. The purported split among the United States Courts of Appeals does not exist. The courts below thoroughly reviewed and then rejected Petitioner's myriad claims. Petitioner's disappointment in the result of the lawsuit and in the appeal to the Eighth Circuit does not warrant further review from this Court. There are no crucial issues of national import and there is nothing compelling about the facts or legal issues that calls for further appellate review of this case. Accordingly, Respondents Fredrick R. Krietzman and Felhaber, Larson, Fenlon & Vogt, P.A. request that the Petition for Writ of Certiorari be denied.

Dated: September 24, 2008

Respectfully submitted,

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Supreme Court, U.S.
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No. 08-241

IN THE SUPREME COURT OF THE UNITED STATES

GLENN S. COHEN,

Petitioner,

v.

BEACHSIDE TWO-I HOMEOWNERS' ASSOCIATION;
FREDRICK R. KRIETZMAN;
FELHABER, LARSON, FENLON & VOGT
A PROFESSIONAL ASSOCIATION;
U.S. BANCORP, D/B/A U.S. BANK HOME MORTGAGE,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REASONS FOR GRANTING THE PETITION

Respondents do not cite a single case in their entire brief in opposition to the Petition for Writ of Certiorari. Respondents would have this Court hold that there cannot be a circuit split unless there is a published decision of the Court of Appeals. There is no merit at all to this argument as it would sanction "private justice" for unpublished opinions, which might be completely at odds with established law in other circuits, or even the same circuit, but would not be subject to review by writ of certiorari.

I. WHETHER A DECISION IS PUBLISHED OR UNPUBLISHED IS IRRELEVANT; THE DECISION BELOW HAS CREATED A CIRCUIT SPLIT ON THIS QUESTION OF EXCEPTIONAL NATIONAL IMPORTANCE

This Court has routinely granted certiorari in cases with unpublished lower court opinions. *See E. Associated Coal Corp. v. Mine Workers*, 531 U.S. 57, 61 (2000) (certiorari granted to review unpublished Fourth Circuit order "in light of disagreement among the Circuits"); *Behrens v. Pelletier*, 516 U.S. 299, 305 (1996) (granting certiorari after the Ninth Circuit dismissed an appeal in an unpublished order); *Cooper Indus. v. Leatherman Tool Group*, 532 U.S. 424, 430-431 (2001) (granting certiorari to review constitutionality of punitive damages award set forth in unpublished Ninth Circuit order).

Certiorari is granted "to resolve the disagreement among the Courts of Appeals on a question of national importance" *Grutter v. Bollinger*, 539 U.S. 306, 322 (2003), or to review a "narrow but recur-

ring question on which courts of appeals have divided" *Clay v. United States*, 537 U.S. 522, 524 (2003). There is simply no requirement that the judgment appealed from be published, nor should this Court establish such a rule.

Whether or not there is a circuit split turns on the existence of disagreement among the Circuits. In the instant matter, there is clearly such disagreement.

In the September 20, 2005 order, the Magistrate Judge denied Petitioner's motion to amend his complaint to add FDCPA claims based on certain letters – not required by statute – which were sent by respondents Krietzman and Felhaber to third parties and to Petitioner. The Magistrate Judge concluded that "debt collection activities are distinct from actions relating to enforcement of security interests, i.e. liens, and security enforcement activities are generally outside the scope of the FDCPA. *Rosado v. Taylor*, 324 F.Supp.2d 917, 924 (N.D. Ind. 2004) (citing 15 U.S.C. §1692a(6))." Pet. App. 105a. The Magistrate Judge concluded,

> [T]he letters at issue with respect to proposed Counts 13 and 14 of the proposed amended complaint are not communications in connection with debt collection as a matter of law and are not otherwise subject to the FDCPA. Plaintiff's motion to amend to allege additional claims under the Fair Debt Collection Practices Act is denied.

Pet. App. 106a.

This section of the Magistrate Judge's order constitutes error. The District Court affirmed the

Magistrate Judge's Order over Petitioner's objections, Pet. App. 39a-40a; and the Eighth Circuit affirmed. Accordingly, the Eighth Circuit has affirmed an order which held that the enforcement of a lien against Petitioner's real property was an activity that is not subject to the FDCPA. This is what causes the Eighth Circuit to be in conflict with five other circuits on this issue of law, as set forth at length in the Petition for Writ of Certiorari.

II. THE INCONSISTENT APPLICATION OF THE FDCPA TO MORTGAGE FORECLOSURES REQUIRES THE INTERVENTION AND LEADERSHIP OF THIS COURT

This is truly a national issue of great importance with a significant disparity in enforcement across the United States. Due to district court decisions, residents of Minnesota, Washington, Indiana, Oregon, New Hampshire and Utah do not enjoy the protections of the FDCPA with respect to their home mortgages or other security interests against their real property.

See Gray v. Four Oak Court Ass'n., 2008 U.S. Dist. Lexis 72419, p. 12 (D. Minn. 2008) (citing this case and separately concluding that enforcement of a security interest in real property does not constitute the "collection of any debt"); *Rosado v. Taylor*, 324 F.Supp. 2d 917, 924-926 (N.D. Ind. 2004) (person not a 'Debt Collector' under the FDCPA when enforcing security interests against real property); *Hulse v. Ocwen Federal Bank, FSB*, 195 F. Supp. 2d 1188, 1204 (D. Ore. 2002) (foreclosure activities not debt collection activities); *Beadle v. Haughey*, 2005 U.S. Dist. LEXIS 2473, No. Civ. 04-272-SM,

2005 WL 300060, at *3-4 (D.N.H. Feb. 9, 2005) (same); *Barbanti v. Quality Loan Serv. Corp.*, 2007 U.S. Dist. LEXIS 676, *8-9 (E.D. Wash. Jan. 3, 2007) (same); *Maynard v. Bryan W. Cannon, P.C.*, 2008 U.S. Dist. LEXIS 46768, *7-11 (D. Utah June 16, 2008) (same).

As a matter of law, and as a matter of public policy, this issue must be resolved. A consumer who is a homeowner in New York, for example, has federal protection against unscrupulous debt collectors who might choose to charge the consumer fees relating to his or her mortgage that are greater than that allowed by state law, or to engage in other activities proscribed by the FDCPA, while a similarly situated consumer in Minnesota, for example, has no federal protection against such activities. This is an untenable situation requiring the intervention of this Court at this time of financial crisis.

III. THE COLLECTION OF ATTORNEY'S FEES IN EXCESS OF THE AMOUNT PERMITTED BY STATE LAW VIOLATES THE FDCPA, WHETHER OR NOT THE UNDERLYING CONTRACT AUTHORIZES REASONABLE ATTORNEY'S FEES. THE DECISION BELOW CREATES AN ABSURD RESULT WITH NATIONAL IMPLICATIONS

Respondents erroneously state that the District Court "simply found on the facts of this case that no FDCPA violation occurred because the attorney fees collected were not greater than the amount Minnesota law permits." Respondent's brief at 7. To the contrary, in its first opinion, the District

Court all but ruled against Respondents, holding that the amount of attorney's fees collected exceeded state law and would render Krietzman and Felhaber in violation of the FDCPA, except for the possibility that the bona fide error defense might apply:

> The application of section 582.01, which caps the amount of attorney's fees recoverable in a mortgage foreclosure by advertisement at a very small amount, renders Krietzman and Felhaber in violation of the FDCPA if they have collected an amount of attorney's fees greater than that permitted by law. Whether there is a statutory violation depends on determining 1) the maximum amount of fees chargeable pursuant to section 582.01, and 2) the amount Krietzman and Felhaber collected in mortgage foreclosure by advertisement fees.
>
> * * *
>
> In this case, given a lien amount of $ 5,920.08, the most Krietzman and Felhaber could have charged for the mortgage foreclosure by advertisement proceeding under section 582.01 is $ 500.
>
> * * *
>
> Taking Krietzman's assertions as true, the amount of attorney's fees charged by Krietzman in connection with the foreclosure proceedings was $ 1,364...This amount exceeds the $ 500 limit "permitted by law" in section 582.01.

> However, as Krietzman and Felhaber argue, they may be eligible for the protection of the bona fide error defense...

Pet. App. 19a-24a.

When the District Court issued its 6/29/2006 Memorandum Opinion and Order, the Court *sua sponte* held that "the governing documents provide for the collection of "reasonable" attorney's fees, and there is no evidence that the amount charged by Krietzman in this case is not reasonable." Pet. App. 77a-78a. The Court then held that "Assuming *arguendo* that Krietzman and Felhaber violated Minn. Stat. §582.01, they did not violate 15 U.S.C. § 1692f(1) because they satisfied the statute's alternative requirement, that the amount collected is expressly authorized by the agreement creating the debt." Pet. App 78a, footnote 6.

As discussed at length in the initial Petition, the Court cited no authority for this novel interpretation of § 1692f(1). Because the legal fees that were collected exceeded the statutory maximum, the fees cannot be "reasonable" attorney's fees. This leads to the absurd result that must be addressed by this Court because of its national implications. This ruling allows a creditor to inoculate itself against an FDCPA violation merely by including a contractual clause which states that the debtor authorizes an amount of attorney's fees in excess of the state law maximum, or otherwise waives his or her statutory protections – an impermissible clause and waiver which is against long-standing contract law as well as public policy.

Consequently, this novel interpretation of 15 U.S.C. § 1692f(1), which contravenes long-established cases holding that one may not contract to undertake an illegal act, creates a federal question of exceptional importance which warrants the attention and guidance of this Court.

CONCLUSION

In this time of unprecedented turmoil in the capital markets, this Court's intervention to resolve the conflict among the Circuits regarding the applicability of the FDCPA to foreclosures of security interests in real property, and to clarify that 15 U.S.C. § 1692f(1) is violated when an amount is collected in excess of that which is permitted by state law, even if the text of the underlying document permits such a violation. Addressing these crucial issues will allow a wide spectrum of consumers to receive the protections intended by Congress at this crucial hour.

For all of the foregoing reasons, and those set forth in his moving papers, Petitioner Glenn S. Cohen requests that this Honorable Court grant the Petition for Writ of Certiorari.

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Dated: October 6, 2008